92-442

Supreme Court, U.S.
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No...

IN THE

SUPREME COURT

of the

UNITED STATES OF AMERICA

March term 1992

DOUGLAS J. MICHELSON,

petitioner,

vs

COMMISSIONER OF INTERNAL REVENUE,

respondent,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

Petition For Writ Of Certiorari

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QUESTIONS PRESENTED

(1.)If there was error in the Court of Appeals in not reviewing the legal issues raised? If a proper standard of review of those issues was used?

(2.) Was there a fair trial and procedure in the Tax Court?

(3.) Was Michelson's constitutional right to engage in the metal business as a dealer in metals respected? Does Michelson's intention and effort and the legal instruments and contracts at the time of entering the business, control the tax consequences of the undertaking? Once Michelson entered the metal business, purchased his inventory, signed documents, made his IRS elections, can IRS choose to not honor them?

(4.)Was a proper application of section 108 of the Tax Reform Act of 1984

had, where no losses are allowed in the year of disposal?

(5.) Was Arkansas Best v CIR, a tax case involving securities, misapplied to the instant case here where metal inventories of one million dollars are seen, and there are no securities? –

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Standard Industrial Classification (SIC) 5051, a metal dealer.

OPINIONS BELOW

The 10th circuit Court of Appeals would not consider the legal errors of the TAX Court on the merits. They refused to reconsider from the malpractice of prior counsel, points preserved in the trial in the lower court, errors showing misprison sufficient for mistrial. It did not address numerous legal issues seen in the brief in chief for reconsideration. It is a gross injustice. It is seen in the appendix as a ruling on facts, and then a procedural ruling on a motion to reconsider. The brief in chief on reconsideration is included to facilitate understanding which issues were raised.

The Tax Court opinion is wrong legally. It is wrong on the evidence, and not supported by a preponderance of the evidence. It is wrong on the procedure,

which it turns into manipulation and abuse. It is wrong on the spirit. It is wrong on the law. The Tax Court Judge addresses much with no basis of evidence, and does not follow proper case law precedent. She manipulates around what is binding on her, to inflict injustice on petitioner.No proper ruling were given. It is seen in the appendix as a TC Memorandum opinion and ruling denying reconsideration.

JURISDICTION

The appellate order denying the motion to reconsider was entered March 25 ,1992.The Jurisdiction of the Court is invoked under 28 USC 1254. The opinion of the Court of Appeals does not follow Supreme Court precedent. It did not provide adequate review. It is a gross miscarriage of justice. It does not

address any legal issue on the merits. It does not correct Tax Court error. It does not address an improper trial.

In the lower court jurisdiction was based on 26 USC 7482.

STATEMENT OF THE CASE

Douglas Michelson, petitioner (hereinafter Michelson) entered his business in 1978 after 15 years of experience in buying and selling metal. He purchased over several months an inventory of metals totaling by end of 1978, exactly $940,377. He financed part of this with a revolving inventory loan from his local bank, secured by a hedging agreement and assignment of hedging account at Merrill Lynch. Michelson maintained a trade account at Merrill Lynch and EF Hutton to buy and sell metal from his inventory. He undertook hedging

contracts for the purchase and sale of metal necessary to his business operations. Michelson took delivery and made delivery of metal as is the custom of a dealer in metals. He represented himself as a dealer. He operated from a commercial office building. He worked at it at least eight hours a day. He did everything necessary to establish the business in a clear legal fashion. He employed tax and accounting experts Peat Marwick Mitchell which advised that until he sold his first metal he need not report on schedule c. Thus 1978 was not reported on schedule c, even though certain things were done in that year to establish the business.

Because of the sale of metal from his inventory, by March 1979, it was necessary for Michelson to report to IRS as a metal dealer on schedule c. He made

delivery from his warehouse stock of metal, $460,050 of copper in 25 or so transactions. He had about $600,000 in metal in inventory after his deliveries. He had contracts for delivery of metal over the next year totaling over $300,000. His business was his main source of income.

The Tax Court says the issue is whether losses sustained by petitioner were capital or ordinary. This is merely pretext to taking away petitioners rights to engage in the business which he established, and sets the stage for shocking abuse by the Tax Court. IRS did not contend until 1984, that he was not operating the business of a metal dealer. In fact they had done everything opposite in treating him. They had issued him a small business tax ID number which he

used to report employees withholding taxes.

Petitioner contends in his own testimony and is supported by expert testimony, as well as his brokers, his bankers, and his associates testimony, that his intention and actions in establishing his business is what will control the tax consequences, no matter the profit or loss or further problems of the business. His business cannot be just "taken away" by unsupported words spoken twelve years later that he was not a dealer. He did not need to incorporate. The good faith entry into the business does not go away just because a business aberration comes about and causes severe losses to the business in its first year. Many business do not survive their first year. And yet the business losses are clearly recognized in that year.

No other case shows the broad and clear trail of legal documents and other evidence pointing to its establishment as a business enterprize, a dealer in metals. The Court of Appeals failed to review them, or trust to their having been interpreted properly by the USDC of NM in its 1982 judgment finding Michelson a dealer in-metals. The only case with similar hedging documents is Monfort v CIR.(1977) ca 10, 561 f2d 190 which the court should have followed.

Later that year,in August 1979, Nelson Bunker Hunt, and other racketeers ran a corner in the silver market. A corner is a predatory devise to gain control on the market and destroy competition. Michelson business was subject to such damage.

Michelson deposited $1.2 million in his account meeting margin calls for

security for performance on the contracts. In December 1979, believing there was no silver available in the market, he switched out of certain contracts, into a later delivery date. These are called switches for a dealer or straddles. These transactions under normal accounting principles gives rise to a tax consequence. It is treated as hedging expense, and adjust costs of goods sold in the year of disposition. Michelson and most other dealers did this type of thing, in their effort to deal with the corner. Some $304,895 in hedging losses were incurred in switching out, and they entered his costs of goods sold for the year of disposition, 1979. Weiler v Cir 187 f2d 744.

IRS in a task force effort to get people dealing in the commodity market using straddles, erroneously swept up

Michelson business with the same broom. It wrongly denied proper treatment of all his losses. Gregory v. Helvering 1935, 293 US 465, 55 s ct 2??, 6 led 596.

IRS does not go through hundreds of other profitable transactions to analyze their purpose and see "if they were closed" in the year of disposition. In fact they lie saying that only losses existed.

If the Court of Appeals had addressed point 12 in reconsideration brief, they would have realized that one year at a time shows the sequence of effort Michelson made going into this metal business. (see point 1 R. brief). This is the proper criteria to judge by and the court of appeals should have reviewed the criteria the Judge used under a law standard.

Why does IRS confuse things with more than one year treated at a time? Why do they not accept 1979 business as filed? IRS wants to make it seem as if there is something more than the normal operations a small business injured by anti-trust misprison. There is not.

In sum, Michelson purchased metal for his business, sold metal from his inventory, and spent his full time in the occupation of a metal dealer. Unfortunate for him, illegal circumstances came along which turned his profit into a loss, and almost destroyed his business.

Since there is nothing in the above shown by the evidence to be wrong, and nothing showing the transactions to be capital in nature, IRS must accept that version of the truth. They must take things as they find them, in the sequence in which they occurred, with judgment

proper to making a proper 1979 tax return as viewed at that moment.

Since Michelson was a dealer in metals all during 1979, and he continued the business during 1980, he must again report results on schedule c. That is consistent accounting. That is what he did. He had sales of metal of $ 733,335 for 1980. In January 1980, Michelson switched other contracts to more distant delivery dates, as he had done in late 1979. Later that month he was sold out by his broker for lack of margin. All the contracts were closed. All other dealers with contracts closed in the corner treated them in the ordinary course of their business as herein. Michelson continued on his business making further deliveries of metal in May. He paid off his bank loan. Most of his time was then devoted to the Merrill Lynch litigation.

Merrill Lynch sued Michelson in an effort to collect. USDC NM ruled in 1982 that the transactions were closed and the account as stated and balance owed Merrill Lynch was correct and due them. The court dismissed his counterclaims, after dealing with several of them. One they analyzed was whether under 4c of the CEA the transactions were bonafide, and closed. They were found to have been executed properly and on the exchange floor. Merrill Lynch collected selling off Michelson's remaining inventories.

IRS makes up its version of "not closed transactions" two years after the court said they were closed. IRS makes up its prospect of recovery issue two years after the court had ruled for Merrill Lynch, and the Appeals court had affirmed, on the only law suit existing in 1980.

The 1980 hedging losses incurred in Michelson's business were clearly part of costs of goods for 1980. He incurred $1,303,977 in the ordinary course of his business in dealing with the corner. They were closed transactions in 1980. This was established by expert accounting and exchange market testimony. This was established by the 1982 USDC of NM court order and decision.

IRS will not accept Michelson's business as it finds it done according to generally accepted accounting principles. So it decides in 1984 for 1980, there are two more rules it wants to apply. These applications are improper because the transactions are fully and properly treated in the ordinary course. These applications are wrong because they are only applied to tax abuse situations created by the taxpayer, and that is not

shown to exist here. These applications are arbitrary and not applied equally to other dealers in the business. These applications were plead in the alternate, having succeeded on the primary, consideration of the alternate is improper. IRS arbitrarily disallows $1,034,929, claiming they were "not closed transaction". Again only losses are treated. They claim there was the prospect of recovery on them when it was filed. Michelson's CPA swore they were correctly treated as hedging losses, in the ordinary course of business and cannot be double treated as a casualty loss. <u>They do not bear any indica of a casualty loss under 165.</u> IRS says(yet offers no expert on it) that even if they were not disallowed that way, they would not be hedges, because he had no silver in inventory. Michelson had part

of them in inventory, the gold part, and according to his experts testimony the remainder were anticipatory hedges correct per the CFTC regulations and laws. Judge Parker ignores such key testimony and makes up her own logic, i.e. that a contract to deliver silver, requires you have silver?? This does not follow contract law, nor use of the exchange. The particulars of partial being in inventory, made no difference to IRS, the Tax Court Judge or did the Appeals Court even review it. They merely go about disallowing losses which has the effect of increasing income, and applying the ratchet of penalties and interest to browbeat petitioner to give in from fear.

Michelson's business was correctly categorized in 1979 or 1980 by the Department of Labor as a dealer in

metals; Standard Industrial Classification 5051. IRS ignores the estopple effect on the government from this, as they ignore their own small business classification estopple. Again, estopple was proper and would not be applied.

In 1985, Michelson moves the court to take judicial notice(FRE mandatory 201d) of the fact that the USDC of NM in 1982 ruled he was a dealer in metals. The court manipulates and will not rule on his motion. That is not due process. Similar procedure was followed by other judges, after en banc decision on Congressional review of IRS action on commodity exchange contracts. see King v Cir tax cch 43,520. Finally there is a trial in 1986. For six months after the pretrial order, IRS stonewalls Michelson and will not stipulate. They will not

respond to discovery and hold fast to their wrong position. Finally the trial comes.

In 1986, the IRS and the Judge make a farce out of the trial. Dumping numerous motions back on him, so they do not appear in the record. They proceed to omit and submit what IRS wants. She denies the existence of the motion for judicial notice and rules against admitting the order, for reasons her and IRS counsel make up.

While allowing Dr. Teweles to testify as an expert, Tax Court Judge Parker in the end treats him as if he had not testified. She makes up his mind for him. The same with a law and tax expert Mr. Marron. She makes him out as a $29 clerk, just having prepared the return on misinformation from Michelson. Yet that is not how he was qualified to testify.

He was an expert. He testified to his opinion that Michelson was a metal dealer, and the Court of Appeals should have reviewed.

The attorney at trial, is not allowed to cross examine or examine the IRS on the notice, or their experience or expertise, or any judgments they made. It is all taken as conclusive, which she wrongly explains to the record as not going behind the notice. That does not comply with the FRE. That is not due process. The Court of Appeals does not even address such an egregious error seen tainting the whole trial and the creditability of IRS versions seen in the notice. No weighing of the evidence against such a tainted background is seen at the Court of Appeals, although if it had addressed the legal issues raised in the reconsideration brief it would have

had to address such under a legal standard of review.

Things were very bad at trial in 1986. That is not the end of the errors. The manipulations go on. The tax court then will not rule after trial and briefing. In yet another manipulation around the required ruling per the Supreme court precedent Corn Products Refining co v CIR, 1955, 350 US 46, 76 s ct 20 ,110 led 29., and the en banc tax court precedent Miller Gilbert, just decided, the Tax Court Judge abuses Michelson by not ruling. Nothing Michelson does to get a proper judgment rendered on the trial gets a response. Such an egregious manipulation around the required precedent and sleeping on a claim four years to increase the interest and penalties is wrong. In equity, the doctrine of laches would clearly hold

that IRS has slept too long on their claim and it was lost. Any courts must say it was a failure to prosecute.

Finally in 1990 Michelson's 1983 antitrust lawsuit is dismissed with prejudice. Since this is the factual common result of most lawsuits, it is nonsense to hold that there was a prospect of a recovery from a lawsuit, and await that. The case is placed with a tax attorney and CPA who promises to leave no rock unturned on appeal. He malpracticed. It is felt that the IRS attorney and his attorney agreed to throw away his appeal. It is clear it is malpractice, in not addressing trial errors, and legal errors. His withdrawal came after a year of MIchelson demanding that he address the legal issues, and the trial issues. The Court of Appeals moves on from something he filed, and then will

not reconsider, all unbeknownst to Michelson. This was manifest lack of due process.

(1.)IF IRS _ HAS AUTHORITY TO DETERMINE IF MICHELSON WAS A METAL DEALER?

The lower court determination that Michelson was not a metal dealer is an excessive application of the statute. see Traux v. Rarch 239 US 33, 36 s ct. 7, 60 led 131 (1915) Michelson has the right to be a metal merchant. The Appellate Court did not properly address the right of Michelson to do a common occupation of the community. The issue was properly

raised. Issues on appeal were not addressed under a proper standard of review. Kotteakos v US 328 US 750, 66 s ct.1239, 90 led 1557 (1946)

At trial, the Tax Court took judicial notice of the Commodity Exchange Act. Therein the purpose and functions of the exchanges is clearly to buy and sell commodities in interstate commerce. Michelson says he was buying and selling metal on a exchange market as a dealer. The Tax Court ignores conclusive evidence and makes up otherwise. It says he was gambling. The appeals court in error did not enforce the conclusive evidence, over the conjecture which was clearly erroneous.

IRS in issuing Michelson a small business number for a sole proprietor and metal business is estopped from claiming otherwise. Additionally, IRS admits in

their answer to the complaint in the Tax Court that he is in business, and kept proper LIFO inventory records, made other elections proper to a business and employed a CPA to keep proper records. The Appellate Court failed to hold the Tax Court to the standard of conclusiveness seen in an admission. Auto Owners inc v. 667 f2d 714, 8th cir (1981) The above were legal issues needing addressing and raised in the reconsideration brief. The Court of Appeals did not address anything in the reconsideration (brief in chief).

The Department of Labor categorized Michelson's business, as Standard Industrial Classification (SIC) 5051, a metal dealer. He listed his occupation as that of a metal dealer on his 1979, 1980 and 1981 return. The Tax Court was

required by judicial estopple to treat Michelson consistent: as a metal dealer.

Tax Court Judge was required by collateral estopple to rely upon the USDC of NM interpretation of the legal documents, and resultant finding that he was a dealer in metals. Legal documents showing his trade was a metal dealer, were not given proper interpretation by the Tax Court or enforced by the review. cf. Edwards v CIR 415 f2d 578, 582, (1969) Nor is review under a clearly erroneous standard correct. A legal standard in which the Court of Appeals reviews the written legal document and draws its own conclusions is correct. (see point 6 reconsid) Any document is persuasive evidence of the fact and legal conclusion Michelson was a metal dealer and conducted his business as a sole proprietorship.

Michelson was totally at risk for the contracts undertaken, loans, etc., as a sole proprietor. (see point 8 of brief on reconsideration.) A Peat Marwick Mitchel KMPG, tax law expert testified to his risk as a sole proprietorship. It was one thing he used in forming his expert judgment that Michelson was a metal dealer, not an investor. This Harvard tax lawyer and CPA used the confidential relationship of 15 years to apply the statutes, and 1979 case law, and to judge the correct category of business expenses, and sales income, and costs of goods sold treatment.

Dr.Teweles, an exchange market expert of national reknown testified that Michelson transactions were proper hedges under the Commodity Exchange Act and that he was a metal dealer, relying on numerous criteria in his judgment

sufficient to arrive at the expert opinion. He referenced a college text, he authored on hedging and other controlling material, such as trade practice. He further testified that any problems Michelson experienced came from a corner in the silver market and its impact on businesses in that sector of the economy. Absent the corner there is no reason Michelson would not have completed the contracts by delivering metal and made a good profit. Shad v. Dean Witter Reynolds 799 f2d 525, 9th cir (1986). Judge Parker misruled under FRE 702, and otherwise in her treatment of expert testimony. She errored in imposing her view on what he needed to make his expert judgment. Such an error was not harmless. re Japanese Products Litigation 723 f2d 238, 3rd cir 1983. She has made so many errors about the

business of petitioner in her opinion as the be unbelievable. She repeatedly refers to securities analogies and market which are not the same as where they sell metal.

It has been conceded by IRS that Michelson's income tax return for the years in question is correct reporting as a metal dealer according to the law and standard accounting practice for that trade. What is the problem? They assert but do not offer any evidence or rebut evidence offered, that he is not a metal dealer. Instead they contend thru Judge Parker, that what ever he does, or did in 1979 was not enough. She ignored any proper criteria referenced in case law for enough, and the Court of Appeals did not hold her to it, Faulconer v CIR 748 f2d 890, 895, 4th cir. and (1984)

Nickerson v Cir 700 f2d 402.,or review criteria which is a question of law.

It certainly is not the evidence adduced that drove the aberrant facts and conclusions seen in the TAX Court opinion. There were no expert witnesses for the government.

Did petitioner's evidence overcome the presumption of the notice? Here again the Appellate Court did not apply the right standard of review of that legal question. Correctly, the Appellate Court should have investigated what is minimally needed by the person with the burden to overcome the "negative" conclusion seen in the notice. Weinstein, a very competent authority, deals with that problem suggesting a minimal standard and a bubble bursting theory. Introduction of any evidence shifted the burden back to IRS. His

testimony alone was sufficient to shift the burden back. And no expert contradiction should have resulted in judgment for Michelson. (see point 9 reconsideration)

Other indistinguishable cases are dismissed. King v CIR cch 42,520. Why King and not Michelson? The Judge is why. The personal view of the Judge, not the law.

IRS gave no recognition to the losses having arisen from the racketeering activity of the corner in the silver market damaging taxpayers business. Again the Tax Court Judge ignores what she judicially noticed, (The Rosenthal, Congressional Committee report) that cornering, and artificial price caused the losses. IRS in its answer had admitted that business were damaged. A judgment of the USDC for SDNY,

Minpeco v Hunt,etal decided the artificial price was against the anti-trust laws on cornering, and under RICO was "racketeering". In spite she decides instead it is all unclear. Michelson was a investor. He had losses because he gambled. Again the Court of Appeals must hold her to the conclusive evidence which show that the losses arose from Michelson trying to deal with a manipulated market. Weiler.v CIR 187 f2d 744.

For IRS, section 165 is their secret weapon. It is nothing but used as an selective enforcement abuse statute. There were billions in anti-trust suits filed and not one other 1979 taxpayer, to this persons knowledge is having their damages disallowed because there is the possibility of recovery from a lawsuit. Why is not Eastman Kodak or Englehard Industries, or Pennzoil or thousands of

others not treated like this? Because it is so ludicrous they would be laughed out of court. There were over $600 million dollars alone in anti-trust suits filed over the corner in the silver market. Were they all disallowed by IRS? No. Only Michelson was! There were ten of thousands of persons involved in the class action in the silver market. Did IRS disallow each of their transactions as not closed? No, only Michelson was.

Internally inconsistent and a telltale, is the fact that IRS did not declare any profitable transaction "not closed". If one transactions was closed upon disposition, all were.

Important to the point is competent legal advise was given that any recovery would be taxed in the year, when and if, recovered. This is the most common advise given by attorneys to litigants when they

discuss damages. It is the way IRS treats most taxpayers. Clearly there should not be two tax times or one so unclear as to tax a "prospect". Certainly not one which chills enforcement. Why , if not abuse, is Michelson treated different? Judge Parker lacking any evidence to point to, misrules, that no evidence to the contrary was introduced. Michelson testified he had expert advise it would be taxed when recovered. And misuses that "he said" at an IRS meeting cloaked in privilege under FRE 408, " he would win his suit" This is no more than the forced confessions of Torquemado's days. (This was covered in point 11 briefed on reconsideration.)

Congress makes it effort to preserve the market and stop the abuse of IRS on small dealers. CEA section 21, (investigating the corner) and section

108 of Tax Reform Act of 1984.(declaring commodity exchange transactions closed in the year of disposition)

The IRS agent was not an expert or offered as one of special expertise in exchange market or by education. Yet he prepared the notice, saying e.g. "that they were not hedges." Compared to Dr. Teweles, education ,experience and expertise, this man is a layman. It makes a laugh of the FRE 702 on expert testimony. Agent Carter was just doing what he was told to get those silver tax abusers. He was not required to introduce his notice exhibit. The court said taxpayer would identify it. It is improper to allow that as the evidence,or the procedure to admit evidence, if that is where the Tax Court evidence came from. The Tax Court is full of misleading and deceitful statements about

the notice. The findings are all made up from attorney conjecture. There is no substantial evidence of the IRS case and on review the Appellate Court misses that point, and affirms.

The Appellate Court was required to address the legal question if there was a preponderance of the evidence in support of the judgment and did not...This Appellate review takes the trial standard of a preponderance of the evidence, and instead makes it a scintilla of evidence is all thats needed.

The Court of Appeals did not address the higher Federal policy which would bind the IRS and Tax Court, i.e. that declarations of non business status is opposite the free enterprise system, and Constitutional rights of taxpayer. Tax Court was incompetent to ignore a market niche which Congress set up in its

commodity exchange market scheme. Tax Court ignored at its peril the testimony of a reknown expert, DR. Teweles, who testified that Michelson was a metal dealer and his hedging transactions followed the CFTC regulations. Dept. of Labor said he was a metal dealer. He was on an exchange list of dealers.

(2.)WHETHER SECTION 108 (26 usca 1092) WAS CORRECTLY APPLIED?

The plain words of the statute convey Congressional intent of the tax law for the year in which the return is filed, (1979). AND IT WAS NOT FOLLOWED. Because there is split between circuits in applying section 108, this court must resolve it.

Five, switches or straddles are closed in 1979. These are the hedging losses Michelson incurred in trying to deal with a manipulated market. Five more are seen in 1980 incurred in trying to deal with the corner.

Congress in sec. 108 of the Tax Reform act of 1984 when it addressed this particular area of the law in regards to commodity futures contracts being closed transactions, and the status of dealers, specifically worded the statute so that it was clear to those transactions prior to 1982. That concerns us here. The Tax Court must follow the literal word of the statute.

(a)General Rule--For purpose of the Internal Code of 1954, in the case of any disposition of one or more positions -- (1) which were entered into before 1982 and form part of a straddle, and (2.) to which the amendments made by title V of the Economic Recovery Tax Act of 1981 do not apply, any loss from the disposition shall be allowed for the taxable year of

the disposition if such position is part of a transaction entered into for profit. (b) Presumption that transaction entered into for profit--For purposes of subsection (a) any position held by a commodities dealer or any person regularly engaged in investing in regulated futures contracts shall be rebuttably presumed to be part of a transaction entered into for profit. (Tax Reform Act of 1984, publ l 98-369, sec 108, 98 stat 630).

Treatment of commodity exchange contract losses "before 1982" were continuing to be allowed "for the taxable year of the disposition". That is the plain language of the statute and what taxpayer can expect to happen. Judge Parker was aware of the binding precedent set by the Court en banc hearing in --- Miller, Gilbert v CIR 1985, 84 TC 55 and inarguably of the effect herein. Much of her trial error and effort was to obscure the precedent, and affect. This court must reverse such manipulation. She did not rule on the law after judgment

because it was unfavorable to her view. - CIR v Textile Mill, CA3, 1944,117 f2d 62, affirmed 62 s ct. 272, 314 US 326, 86 led 249 She made Michelson into one of those dealers she felt she could deny fair treatment. She moves forward on her own and IRS's sub agenda. (What'll we do now, after **Miller, Gilbert?)**

Congress was clearly aware that there had been some abuses in the use of "silver tax straddles" in years prior to 1982 and addressed them knowing that the IRS cases then before the Tax Court would be effected if the CONGRESS chose to so effect them. It did.(see p842 **Miller, Gilbert** supra) It is important that the Supreme Court give effect to Congress' wish to rein in IRS abuse.

This is important to this case because it was started off from the dragnet operations of the IRS against

anyone who dealt in the silver market. There is practiced deceit by the judge about the notice and its admission into evidence , and weight and presumption of it (t-3,25,1002 ,1004)) and her disallowing of evidence bearing on it and issues within incorrectly treated.

Congress was aware of the corner and the abuse of taxpayers by IRS noticing them for doing what had always been allowed and was advised by the experts, and chose its method of rectifying it. Congress acted and the en banc Tax Court hearing in **Miller, Gilbert,** supra adhered to it. "On these fact we are constrained by section 108 to find for petitioner notwithstanding the fact that this result is directly contrary to our holding in **Smith and Fox** . It is not, however, for this Court to question the wisdom of the congressional mandate...

(p846)...and concurring on p850...If the practical effect in honoring the clearly expressed will of Congress is to grant amnesty to pre 1981 commodity tax straddlers, so be it. It is certainly not the proper function of this or any other Court to subvert the will of Congress by substituting the personal preferences of the Judges, and the majority prudently has not done so. "

The tenth circuit two years later overturned Miller Gilbert v Cir 836 f2d 1274 (10th cir 1988). They did that because of tax avoidance motive of taxpayer, not seen here. Or the use of the loss to offset income from other sources, also not see here. Kirchman v Cir 862 f2d 1486 (11th cir 1989). Thus it was proper for the tenth circuit to address the issue herein. They did not properly do a legal analysis as applying

section 108 as used by a dealer, switching out of a month to a later month, because of a corner in the market. We do not concede section 165 recategorization is proper,(as it is only proper where avoidance or abuse is primary motive- not shown here) from the inventory treatment afforded a dealer. But if such analysis were done it would not be disallowed in the year of disposition.

The 9th circuit addressed section 108 in Wehrly v US 808 f2d 1311, 1314, 9th cir. 1986. They found a broad profit motive was all that was needed, and error in the court instruction to the jury, in giving a narrow interpretation. It also was not not claimed to be used to make delivery of metal as the use was herein.

The 3rd circuit addressed the issues of section 108 in Lerman v CIR 939 f2d 44

(3rd cir 1991) where sham transactions were used to offset other income sources, not seen here. However, the court did on pg 53 reach the essence of its reason why Congress enacted section 108 which is the same as that seen here. " Thus section 108 prevents the Commissioner from disallowing loss deductions by pointing to evidence that any one dealer did not have a profit motive on any one trade taken alone". Michelson merely wants treatment in the ordinary course of his business as was afford thousands of other dealers harmed by the silver market.

Judge Parker of the tax court was incensed at the free ride given the commodity dealers, ignored Congress and the tax court precedent. Both are error reversible by this court which should have been done by the reviewing court.

She was part of a strongly worded dissent. She felt that:

..."The real significance of the issue to be decided by the court today can be illustrated by figures contained in the congressional debate; reportedly , notices of deficiency have been issued in 15,000 cases involving tax straddles and deficiencies of $1.5 billion. 11 Cong Rec. s 8390 (daily ed June 27,1984) and 12 Cong. Rec. E3251-E3252 (daily ed July 24, 1984) By the enactment of section 108 of the Tax Reform act of 1984, Congress has clearly indicated that tax relief is to be extended to dealer in tax straddles at a cost of over $300 million in revenue." pg850 **Miller,Gilbert.**

Congress had its eye on values of federal policy which were more important than revenue.

Tax treatment in harmony with this judgment and opinion would have been the ideal resolution herein, combined with what had transpired under **Miller, Gilbert** and Congress' investigation of the corner. Grason Elec. V. Sacramento Muni Utility Dist. 571 f supp 1504 It would protect the government as under tax laws, the government would collect tax on the recovery when is was proven, that there

was a corner. She was required to use the evidence persuasive on the issue and to apply those common facts to the law, to resolve the case. Error in NOT RULING on the mandatory request for judicial notice was made and prejudiced the rights of petitioner in handling the case. Going forward from there, is a record permeated with error and abuse. She further misused procedure in not determining that there in fact were no issue to go to trial on that had not been decisively determined as a matter of law by the Miller, Gilbert v CIR, supra, ruling of the en banc tax court applying the wording of the written statute. She continued to error in disallowing petitioner rulings on his motions properly submitted which went to the experts IRS consulted , and admissions and other pre-trial work. She allowed no

attorney authority to properly process the suit.

She took the clear wording of the statute as regards dealers presumption and trashed it. Her opinion wrongly stated four years after trial was that buying and selling metal on the exchanges is insufficient in itself to qualify as a metal dealer. He must have "some separate trade or business apart from the commodity futures transactions themselves"(pg 29 (568). Michelson had a million dollars in metal inventories and years work with a lot of people in establishing the business correctly. Such was not the law (CEA sec 2,3) or practice per Dr. Teweles interpreting trade practice, in 1979. It was not what Congress intended in its statement to presume dealers and get rid of the pre 1982 cases. It was not what chairman

Rostenkowski as reflective of Congress intended. The usual merchandising function seen of dealers on a board or trade is "risking capital" in "carrying an inventory" which "they sell" from. This merchandising function Congress has so defined in the CEA which she judicially noticed, is what Michelson conformed to.

(3.)IF JUDGE PARKER ERRORS IN UTILIZATION OF ARKANSAS BEST V CIR, (1988) 485 US 212 AS UNDERLYING AUTHORITY FOR THE RULING SHE MADE?

Judge Parker was required to rule by law of the case under **Corn Products v CIR, and Monfort v CIR,** in application of the law to this case looking to tax law, for the year 1979 and 1980 and 1981.

It was error for Judge Parker to hiatus for four year and then misuse a Supreme Court case decided two years

after trial and definitely not then applicable to the case because (1) it was not authority cited by respondent in brief or pre-trial and thus was not law of the case. (2) such an metal inventory case is not addressed within Arkansas Best, it is excluded (3) the bright line of the cases is that the legal instruments in Arkansas Best are securities evidencing ownership of an enterprise, whereas in Michelson the legal instrument was a contract to sell metal for future delivery on a contract market.

Clearly the questions applicable to abuse of "capital gains law" seen in--- Corn Products, inc supra, would not have been seen by the Supreme Court at that time as having any concern because the distinctions had been done away with by Congress in 1986. That leaves it a narrow

question of securities held by banks or other investors who claim various use of them in mergers.

Use of this case law retroactively is a misuse that must be corrected. Having no value because it is not on point it is mute on the question of vittating Corn Products. Arkansas Best is clearly not an overriding Supreme Court decision on hedging, as misapplied to this case. Despite wording excluding inventory applications such as Michelson who had inventories in excess of a million dollars, Judge Parker muddies the water. As she has in her opinion, and IRS counsel has throughout, she side steps the bright line seen in the cases over the years where the instrument being dealt with is "securities" governed under Securities law, and confuses it with those transactions as in Michelson, Corn

Products, and Monfort where the transactions are in contracts for metal or corn or beef. The treatment is consistently different. This same mistake is seen in reliance upon Kemon v. CIR, 16 T.C. 1026 (1951) in her opinion and in trial brief. Clearly proven at trial is the fact Michelson used the contracts to take delivery or make delivery of metal, adding to or selling from his inventory of metal. No more is usually required to be shown.

It is error to ignore petitioner's testimony and documents which show that in all petitioners prior dealings on the exchange he bought metal or he sold metal.(pg25 (564) And that in entering the contract selling gold for delivery in August 1980 he intended to deliver gold from his inventory which contained gold. And for the silver contracts he entered

to deliver silver in 1981 and 82, he intended to deliver silver from inventory when the contracts were due. None of the contract delivery dates came about nor was delivery made because Merrill Lynch acted precipitously closing all his contracts. It is important to known that a corner is a predatory devise used or which results in harming other business, to understand the circumstance Michelson was in here. Merrill Lynch, the only contact with Michelson who could harm him in a corner, was held accountable. Merrill Lynch's version of the situation as "he was speculating and he was committing financial suicide, and they were saving him from himself" was proven wrong in a court of law. In MINPECO v Hunt, et al it was proven the cause was a corner, fraud and racketeering. Merrill Lynch said the same thing about their

customer MINPECO, largest dealer of silver in the world. Judgment is in this record, applicable by collateral estopple and res judicata to Michelson through Michelson's lawsuit. . Absent Merrill Lynch's action harming Michelson there would have been no losses to his business, or Minpeco's.

The opinion and legal conclusions show no consideration given at all to the corner in the silver market which in fact caused the losses to come about. Absent the corner Michelson would have delivered silver in fulfillment of the contracts in 1981 and 1982, as his plan called for. It is error to not see it as a continuum of events rather than a fixed event and ignore the testimonial record in these matter which press firmly on the issues. Michelson undertook a contract to deliver

metal and was interrupted in his endeavors by the corner.

Judge's error on why Michelson's filed schedule c is seen on pg 19 (558) where in a concert to make it appear that Michelson was motivated by consideration of the losses to file schedule c, she states, "After the losses in the commodity futures transactions sustained in 1979 and 1980, petitioner for the first time filed schedule c's with his tax returns." It is misleadingly worded and incorrect as to the cause. If there had been no corner and no silver losses, Michelson would have been required to report on schedule c, the material income of almost $500,000 in March 1979, with profits of almost $200,000. Treatment of his developing business on schedule c after sales started, had been discussed with his accountant in 1978, when

certain transactions were started, and when he finalized the hedging agreement with his bank and Merrill Lynch, and when he bought his metal inventory. As she states it, and because one is mislead to think there is no other business than the losses, and no other transactions than those before the court, it is error. It is totally contradicted in the record.

And in all those 58 other prior contracts he took metal into his inventory. So the implication seen in page 27 (566) that he was a investor because "the transactions in commodity futures in 1979 and 1980 did not differ from petitioner's earlier commodity futures transactions" is in error. To imply that the purpose for those done earlier was investment is contradicted by the facts above and others.The proper implication drawn from the petitioner's

expert accountants testimony, and his own testimony, and the document records is that those earlier transactions were purchases of metal for an inventory of his stock in trade, and the schedule c did not need to be filed until metal sales were made. Thus 1978 was properly filed. The unsupported inference that they show investment is pure rubbish, made up. Even in **Monfort** IRS argues prior dealings treated different. What was necessary to start a sole proprietorship in 1979 was the procedures Michelson undertook. The Court is confused by misapplication of inference to regulation after the years, and hurdles made up after the fact.

Judge Parker refers in the **Michelson** opinion to "securities"(pg 24 (563) showing a lack of soundness in her opinion since nothing in law or evidence

at trial or in the record remotely supports that view. This court must correct clearly erroneous views which bear heavily on the case law and certainly to the functional use. The law clearly defines "securities" different from commodity futures contracts. If one thinks of stock, he thinks of things that have intrinsic value and evidence ownership of an enterprize. One is at limited risk. One does not have to select and grade his metal, insure it, store it or deliver it. He does not have to know purity, form, and weight standards or other specifications showing known by Michelson herein. She is wrong to couple the words "securities" with the words "commodity futures contracts" pg 24(563)& pg31 (570) for her own purpose and the court can correct the error and implication to case law misdrawn. One can

sell a security to anyone. One must perform a contract to deliver metal. Finding Michelson used commodity futures contracts for future delivery of metal from his inventories is proper. Securities has no application. It is paramount to consider the purpose the contracts were entered. It is what should weigh heavily. Judge Parker should not have ignored the testimony to that point and should have admitted the contract cf. Edwards v Cir 415 f2d 578,582 (1969) Two more errors. Investors have theories of investing not shown here to exist. Investors take seriously that stock represents ownership of the enterprize. They are buying an interest in a business, or evaluating its worth.

IRS's counsel in its brief relies on those cases wherein the legal instruments are clearly securities. As such they do

not bear on this case. You cannot hedge metal inventories with a security. You cannot insure a future price for a commodity with a security.

The proper review is one of law. Whether or not the **Arkansas Best** case was overriding Supreme Court doctrine on hedging a metal inventory? Since this was a case of first interpretation of Arkansas Best in the 10th circuit the Court of Appeals was required to analyze the law under a proper standard of review. It should be remanded for that to occur. Or this court should rule that it was a proper inventory situation and no securities were involved, and the return is admittedly correct as filed.

REASONS FOR GRANTING THE REQUEST

(1.) By granting the request for certiorari the court will resolve the conflict between the circuits in interpreting section 108 of the tax reform act of 1984.

(2.)By granting the request for certiorari the court will further the administration of justice in clarifying taxpayers elections and IRS ignoring these.

(3.)By granting the request for certiorari the court will force the circuits to address issues seen in Arkansas Best v CIR in a clear manner for securities and in a clear manner for commodity futures contracts used in hedging as herein.

(4.)By granting the request for certiorari the court will clarify the

role of review to be done by the circuit courts, which was not done herein.

(5.)By granting the request for certiorari the court will clarify abuse of discretion in not rendering judgment within 30 days of trial, an abuse the Court of Appeals should have properly addressed.

(6.)By granting the request for certiorari the court will properly subordinate the tax court to other courts, to the administration of other agencies of specialized import, and to a policy promoting the commerce of the country and consistent tax thereon for all starting a business.

(7.) By granting the request for certiorari the court will further proper tax administration procedures embodied in constitutional principles of due process

and a fair trial. It will assure equality of taxation between big and small business in the same sector of the economy.

(9.)By granting the request for certiorari the court will clarify the role of the expert under the Federal Rules of Evidence as applied to the Tax Court.

(10.)By granting the request for certiorari the court will clarify the role of collateral estopple in proper tax administration, ignored here as irrelevant ruling from another court.

(11.)By granting the request for certiorari the court will show a special concern for the enforcement of Congressional enactment to rein in IRS abuse.

(12.)By granting the request for certiorari the court will allow a small

businessman to continue on in the metal business, make a living, pay taxes and contribute to society. It will weigh the scales of justice correctly to have allowed equal treatment under the law.

CONCLUSION

An error was made in the Court of Appeals in not correcting an injustice. IRS is being abusive in disallowing things to take their normal course. They are not allowing the taxpayer elections he rightfully can make. They ignore industry experts and his testimony. They stonewall the fact that he alone is disallowed certain transactions because he had a prospect of recovery, while no others similarly situated are so treated. It is clear policy to collect all recoveries from the taxpayers when they are received. Then it is certain

treatment of income, not pre-treatment on prospect of income.

Was Michelson hedging? Was he a dealer in metals? It is unlikely an expert of Dr. Teweles experience could be mislead on the subject. He says Michelson was using anticipatory hedging, then the burden shifts to IRS to provide expertise that it was not. They did not do this. And the Judge went astray calling it gambling. It was not gambling. She should have allowed cross examination of the IRS agent. He made no record from which she derived it was gambling for her to have used. Absent proper procedure allowing cross examination of that and expert testimony to counter Michelson's expert in such a acarne business, Michelson must prevail.

Since all using an exchange must adhere to CFTC rules, IRS cannot tax

some on the rules and others not on the rules. If Michelson was hedging according to the CFTC rules, then it is hedging for tax purposes.

Since Congress set the cutoff date of 1982 in statute, great difference must be given it. The tax Court en banc decided that it was a pre 1982 amnesty on straddles and that the year of disposition is when they were closed. It is significant here that Congress chose of all its ways, to say that the transactions "were closed". It knew of the "not closed" treatment of IRS as herein, and clearly intended to work its will. Otherwise there is no reason for legislating that way, since it was industry practice to treat contracts closed when executed.

IRS should have accepted the taxpayers efforts at establishing his

metal business in 1979 within the requirements of the day. $500,000 in metal sales and $200,000 in profits is a good small business. It is a start. The commercial documents are only seen for a dealer. Michelson made contracts to make delivery of metal.

Courts have some latitude in matters of estopple, judicial estopple, and collateral estopple. It would seem that less discretion should be allowed in Tax Court in rejecting the proper application of these principles. Again, taxing is the proper application to givens of the tax rates, and it follows that what is a given from another lawsuit, or another agency or another part of government, must be readily accepted by the Tax Court. There is a need for subordinating them to other courts and for consistent treatment. Judge Parker errored in not

giving effect to the collateral estopple principles applicable from the Judgment of the USDC of NM. While collateral estopple is generally to privies, the modern practice is to grant it very broadly. That would surely bind the IRS or government which is privy to every taxable transaction. She should have taken judicial notice to the fact that Michelson was a metal dealer because he was found to be one in the USDC of NM on similar circumstance and legal documents.

Estopple against the IRS should have been granted because the Department of Labor had investigated and classed him as a metal dealer, and IRS treated him as a business, and admitted in the pleading he was in business.

No...

IN THE

SUPREME COURT

of the

UNITED STATES OF AMERICA

March term 1992

DOUGLAS J. MICHELSON,

petitioner,

vs

COMMISSIONER OF INTERNAL REVENUE,

respondent,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

APPENDIX A

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1.

United States Court of Appeals for the Tenth Circuit

Douglas J. Michelson, petitioner appellant,

v. no.90-9020

Commissioner of Internal Revenue, respondent, appellee,

---

order entered March 25, 1992

Before McKay, Chief Judge, Holloway, Barrett, Logan Seymour, Moore, anderson Tacha, Baldock, Brorby, and Ebel, Circuit Judges.

We consider appellant's motion to reconsider filed January 3, 1992 his motion for extension of time and " motion

to reconsider and Suggestion for En Banc Hearing and Memorandum Brief" filed Feb 27,1992, as a timely petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition is denied by the panel that rendered the decision.

In accordance with Rule 35 (b) Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active services on the court having requested that the court be polled on rehearing en banc, rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered by the court, Robert L. Hoecker, Clerk, by Patrick Fisher, Chief Deputy Clerk

2.

United States Court of Appeals for the Tenth Circuit

Douglas J. Michelson, petitioner, appellant,

v no 90-9020

Commissioner of Internal Revenue, respondent, appellee,

On appeal from the decisions of the United States Tax Court , [illegible] court numbers 8130-82, 18686-84,16775-85

Mathew E Cohen and Roy A Anuskewicy, jr. Albuquerque, New Mexico on the briefs for petitioner-appellant.

Shirley D. Peterson, Assistant Attorney General, and Gary R. Allen, Kenneth L Greene, and Steven W. Parks, Department of Justice, Washington, D.C. on the brief for Respondent-Appellee.

Before McKay, Chief Judge, and Barrett and Brorby, Circuit Judges.*(footnote at end)

Brorby, Circuit Judge

Mr. Michelson appeals from the decisions of the United States Tax Court entered July 26,1990, determining deficiencies in his federal income tax for the years 1976-81. We affirm those decisions.

The issues in this case derive from the financial losses Mr. Michelson sustained as a result of his transactions involving metal futures (primarily silver) on various commodity exchanges.

Characterization of Mr. Michelson's losses was the principal issue before the tax court. Mr Michelson asserts he was a dealer in metals. As such, he contends the losses resulting from the 1979 and 1980 futures transactions were ordinary rather than capital losses. On Appeal Mr. Michelson challenges the tax court's factual findings that: (1.) Mr. Michelson was not engaged in a trade or business as a dealer in metals in 1979 and 1980; (2.) the losses Mr. Michelson sustained in 1979 and 1980 were capital losses; (3.) the portion of the 1980 loss allegedly attributable to Merrill Lynch's liquidation of his commodity account was not sustained in 1980; and (4.) Mr. Michelson did not pay interest on his margin accounts in excess of the amounts allowed by the Commissioner of Internal Revenue. IN addition , he challenges the

tax court's refusal to admit as evidence a federal district court memorandum opinion and order from a related , but independent civil action. We address each challenge separately.

I. "The clearly erroneous test of Rule 52 a is the appropriate standard for appellate review of factual findings...." Sanchez v. Bond 875 f2d 1488, 1495, (10th cir 1989)., cert denied, 11 s ct 340, 1990. This standard is met only when this court, after reviewing the record ,is left with a ".definite and firm conviction". that a mistake has been made. Merchants's Nat"l Bank of Topeka v CIR 554 f2d 412, 415 (10th cir 1977) (quoting United States v United States Gypsum co. ,333 US 364, 395, (1948).

Our review of the records leads us to believe the tax court made no factual mistake in this case. The record amply

supports the tax court's findings. For example, as to the tax court's characterization of Mr. Michelson as an investor who suffered capital rather than ordinary losses, the record indicates that prior to 1979, Mr. Michelson characterized his occupation as "investments" and reported his transactions to the revenue service accordingly. He never filed a schedule c reporting his commodity transactions as involving gains or losses from the operations of a business until he sustained large trading losses on the silver futures market in 1979-80. Notably, Mr. Michelson's market transactions in 1979-80 were not materially different from those in earlier years. At no time was Michelson licensed to sell futures, nor was he a member of any commodity exchange.

Despite Mr. Michelson assertion's he was a dealer in metals, the record reflects the only physical metals ever owned by Mr. Michelson were 400 ounces of gold and 1,510,225 pounds of copper, held by means of negotiable warehouse receipts. Mr. Michelson acquired these metals on the commodity market and held both for a long period of time as one would an investment. The record further indicates that although Mr. Michelson's losses were due primarily to fluctuations in the silver market, he never owned any silver in its physical form. Moreover, the record reflects no acquisition of metal directly from any refinery or any off exchange supplier, no separate business activity that utilized metals, and no frequent sales to customers or related merchandising activity.

With regard to the tax court's finding that the portion of the 1980 loss allegedly attributable to Merrill Lynch's liquidation of his commodity account was not sustained in 1980, the record indicates Mr. Michelson maintained five counts on a counterclaim in an unresolved, independent action to recover those losses against Merrill Lynch. The tax court resonably inferred from Mr. Michelson's refusal to answer a question on cross-examination that he had previously assured the government he would prevail in that action.

Finally, with regard to the payment of interest on Mr. Michelson's margin accounts, the exhibits relied upon by Mr. Michelson do nothing more than illustrate the amount of interest charged. These documents are not sufficient to show that Mr. Michelson in fact paid these amounts,

or that the interest paid exceeds that allowed by the Commissioner. Testimony in the record supports this finding.

Mr. Michelson sought to introduce a Memorandum opinion and order of the United States District Court for the District of New Mexico involving an independent civil action between Mr. Michelson and Merrill Lynch. In essence, the order dismissed twelve of seventeen counts asserted in Mr. Michelson's counterclaim against Merrill Lynch. Mr. Michelson offered the order as evidence he was a "dealer" in metals. An introductory paragraph described Mr. Michelson as "a dealer in precious metal". The tax court refused to admit the order as evidence , observing that Mr. Michelson had not shown that the description of him as a "dealer" was anything more than background material

,or that his alleged status as a dealer was a disputed issue resolved by the court in that case. Moreover, the government was not a party to that suit, and what might constitute a dealer for the purposes of the issues involved in that case was not controlling n the federal income tax context. As such, the tax court held the proffered evidence lacked any probative value. We agree.

On appeal, Mr. Michelson also contends the tax court erred in declining to admit the order as evidence that he lacked a reasonable prospect of recovery in that suit and hence sustained those losses allegedly attributable to Merrill Lynch's liquidation of his commodity account in 1980. This argument fails for two reasons. First, Mr. Michelson failed to offer the memorandum opinion and order for that purpose. Second, while the order

dismissed several counts of Mr. Michelson's counterclaim, five counts remained. Nothing in the record indicates that the remaining counts do not assert claims for the full recovery of the losses allegedly attributable to Merrill Lynch's actions in 1980.

"The decisions to admit or exclude evidence is within the sound discretion of the (trial) court, and , on appeal, reviewable only for an abuse of discretion. " Boren v. Sable 887 f2d 1032, 1033. (10th cir 1989). The tax court did not abuse its discretion in this instance.

In conclusion, we hold the tax court's findings are not clearly erroneous. Furthermore, the tax court acted within its discretion when it refused to admit another court's opinion into evidence for the purpose for which

it was being offered. We therefore AFFIRM the tax court's decision for substantially the same reasons as those set forth in its thorough Memorandum Opinion, entered January 16,1990. 58 TCM (CCH) 1219 (1990) .

*(footnote) After examining the briefs and the appellate record, this three judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See fed. r App. P.34. a ;10th cir r 34.1.9. The cause is therefore ordered submitted without oral argument.

EXPLANATION RELEVANT TO THE ABOVE..

After submitting an inadequate brief which constitutes malpractice, Mathew Cohen submitted his withdrawl motion. It is supposedly on that brief and those

issues which the court ruled. They did not fairly considered the issue of law and law and fact, and of a fair trial, raised on appeal and preserved in the record of the trial court. Certainly withdrawl is indicative of a problem in the appeal "so easily ruled upon" . To say that they are reviewing only finding of fact of the tax court is a laugh. That is inadequate review, if there are errors preserved at trial, which there were. Appellate courts generally have to take findings of fact as they find them. Given that, they in fact did not consider in depth the problems at trial and in law. On the motion to reconsider (brief in chief) resubmitted, at least twenty grounds of review were sought to have ruled upon by the court of appeals in a reconsideration brief. They would not review what was required to review, but

merely procedurally cheated Michelson of his-appeal, with the complicity of his "attorney" who had withdrawn.

3.

Tax Court Memo 1990-27

United States Tax Court

Douglas J. Michelson, petitioner v. CIR, respondent, docket nos. 8103-82, 18686-84, 16775-85,
filed January 16,1990.

Douglas J. Michelson,pro se.
Linda L. Wong, and Val J. Albright, for the respondent.

MEMORANDUM FINDING OF FACT AND OPINION

Parker, Judge: In these consolidated cases, respondent determined deficiencies in petitioner's federal income tax as follows; 1976 $77,996; 1977 $ 14,212;

1978 $12,049; 1979 $93,631; 1980 $ 305,653, 1981 $35,360.

Unless otherwise indicated, all section references are to the Internal Revenue Code of 1954, as amended and in effect for the taxable years in question, and all rule references are to the Tax court rules of Practice and procedure.

This case arises in the context of the attempt by the Hunt family and the Conti group to corner the silver market in late 1979 and early 1980. The principal issue for decision is whether losses sustained by petitioner (primarily in silver futures transactions on various commodity exchanges) are capital or ordinary. The transactions resulting in the losses occurred in 1979 and 1980, an petitioner claims net operating loss carrybacks and carryovers to the other years involved in this case.

Alternatively, as to the January 10,1980, transactions in which Merrill Lynch Pierce Fenner and Smith,inc. (hereinafter "Merrill Lynch") liquidated petitioner's positions in his commodity account, the issue is whether that liquidation resulted in losses sustained at that time and deductible in 1980. If there was a reasonable prospect of recovery in subsequent years because of petitioner's pending litigation against Merrill Lynch in regard to that liquidation, then it cannot be said that the loss was "sustained" in 1980. sec 1.165- 1d 2i, income tax regs. Apart from various expense deductions that respondent conceded at trial,(footnote one at end) there remain issues as to the amounts and year of deductibility of certain interest paid on petitioner's Merrill Lynch and Ef Hutton margin account.

FINDINGS OF FACT

At the time he filed his petition in this case, petitioner Douglas J. Michelson (hereinafter petitioner) resided in Albuquerque, New Mexico. Petitioner filed his individual Federal income tax returns (forms 1040) for the years 1976 through 1981 with the Internal Revenue Service Center at Austin, Texas, except for the 1978 return that was filed in Fresno California; with the returns for 1979 and 1980, petitioner for the first time filed schedule c's on which he claimed to be a dealer in metals.

Petitioner was graduated from the University of New Mexico with a bachelor's degree in finance. He immediately went into the family business, Bell Trading Post, inc later known as the Sunbell Corporation (hereinafter Sunbell). Sunbell was a

manufacturer of silver, turquoise, and copper jewelry and also leather products and copper giftware. At one time Sunbell had four factories in three different states and a nationwide sales force. In 1964, Sunbell had 100 employees and by 1976-78 ,it peak years had 1000 employees. Both petitioner and his brother served on the Board of Directors of, and worked for, the family business. The brother was in charge of manufacturing and petitioner was in charge of data processing department. AT one time petitioner also ran Sunbell's subsidiary corporation, Decor Industries, inc, located in Dallas, Texas. Decor INdustries dealt in alumnium castings. After petitioner returned from Texas to Sunbell's headquarters in Albuquerque, New Mexico , h was involved in setting up the company's inventory method (LIFO

method) . IN the early 1970's petitioner sold his interest in the family business and was not thereafter involved in Sunbell's business operations.

Petitioner entered politics and in 1972 was elected to a four year term in the state legislature. He ran for re-election in 1976 but was unsuccessful. Petitioner's income producing activities thereafter were those of an investor. In 1974, while he was still serving as a state legislator, petitioner opened a commodity account with the local Albuquerque office of Merrill Lynch, a stock and commodity brokerage firm. While the record is not entirely clear, apparently the account was opened as a trade or hedging account, rather than as a speculative, account. A significant difference between the two is that the margin requirements on a trade or hedging

account are about half as much as those on a speculative account. By 1976 petitioner also had some type of account with EF Hutton, another stock and commodity brokerage firm.

Petitioner obtained loans pursuant to a lines of credit with the First National Bank in Albuquerque, and he used the proceeds of those loans, together with other funds from his stock and cash management accounts, to meet the initial margin requirements and margin calls by Merrill Lynch on his commodity account. IN February 1978 petitioner, as the debtor, executed a Security Agreement, Assignment of Hedging Account, to the First National Bank of Albuquerque, as the secured party. The bank also took petitioner's commodity warehouse receipts as additional collateral for the loans. There is an ongoing dispute between

petitioner and Merrill Lynch as to whether petitioner's commodity account was a trade or hedge account, as petitioner contends, or a speculative account, as Merrill Lynch contends. By 1979 and 1980 Merrill Lynch was taking the position that petitioner's commodity account was a speculative account. (see footnote 2 at end) .

On his Federal income tax returns for 1978 petitioner listed his occupation as "investments" and reported substantial capital gains as follows: 1976 Interest income $, 48,480 , dividend income $50,394, capital gains income $151,307; 1977 interest income $48,488, dividend income $38,892, capital gains income $9,134; 1978 interest income $ 52,992, dividend income $45,420, capital gains income $8,142.

Petitioner also reported small amounts of rental income or losses in those years; he did not report any wage income or any schedule c income or losses from a trade or business. ON his schedule a's for those years, petitioner deducted substantial amounts of interest expense paid to Merrill Lynch, EF Hutton and the First National Bank in Albuquerque, and (and other banks) and also deducted substantial amounts of investment expenses as miscellaneous itemized expenses. The investment expenses were described as relating to something called "Rembrandt Investment" in which petitioner was described as an "investor". The investment expense were deducted as miscellaneous itemized expenses on schedule a and included, amount other things, "commodity expense" or "commodity storage fees" in the

amounts of $9,915.,$8,463, $$15,213 for 1976, 1977,1978 respectively.

Beginning with his opening of the commodity account with Merrill Lynch in 1974, petitioner over the years purchased some copper and gold (see footnote 3) which he held by means of negotiable warehouse receipts. Metal in proper form to be delivered through the commodity exchanges is normally stored in public warehouses approved by the exchanges and is transferred by means of negotiable warehouse receipts so as to obviate the need for the seller to have the metal assayed at the time of delivery. The record does not establish that petitioner ever bought any copper ,silver, or gold or any other metal from a refinery or any other supplier, or in other words, except in a transaction on a commodity exchange. Petitioner is not a broker, an dhe must

conduct any transactions on the Chicago Board of TRade (CBOT) , the New YOrk Commodity Exchange (COMEX) , or any other commodity exchange through a licensed broker such as Merrill Lynch or EF Hutton.

A commodity futures contract is a promise by the person in the "short" position to deliver (sell) and by the person in the " long" position to take delivery of (buy) a fixed quantity of a commodity of a certain grade at a fixed price during a specified delivery month and year. (see footnote 4) While the year an delivery month are fixed, the person who is to deliver or sell the commodity (the person in the "short" position) has the option as to the day of the specified month on which he will make delivery. The parties to any commodity futures contract always have the right to

offset rather than make or take delivery. Most commodity futures contracts are closed out by offset rather than by actual delivery of the commodity, but of course actual delivery does sometimes occur. Petitioner, for example, actually took delivery of some copper and gold. By January 1,1979 ,petitioner had acquired through transactions on the commodity exchange 1,510,225 pounds of copper. Some of the copper had be acquired in 1974 (7 contracts) ,some in 1975, (21 contracts), and the rest in 1977 (30 contracts) for a total of 58 contracts. Normally, a contract for copper is 25,000 pounds, but there may be some minor variations. Also petitioner had acquired 400 ounces of gold in September of 1975. A contract for gold is 100 troy ounces of a certain fineness.

As of January 1,1979 petitioner owned and held by means of negotiable warehouse receipts 1,510,225 pounds of copper and 400 ounces of gold. During the years 1979 and 1980 petitioner never owned any silver. (see footnote 5) The record does not establish that he ever owned any silver metal in deliverable form at any time from 1974 through the end of 1980.

In early 1979 petitioner went to California to look for a job or some business opportunity. He returned to Albuquerque, new Mexico after three or four months. Both before and after his trip to California, petitioner entered into various commodity futures contracts in copper, gold, and silver, which resulted in the losses involved in the case. see n. 4 supra. Most of the losses were incurred in silver transactions. A

silver contract is for 5,000 troy ounces of silver of a specified fineness. IN 1978, petitioner had entered into five commodity futures contracts to deliver silver (to sell silver, ie. short positions) as follows:

(Chart I.)

#	EXCH	DATE	DELIVERY	PRICE	PROCEEDS
1.	CBOT	11-16-78	Dec 1980	$6.92	$34600
2.	CBOT	11-17-78	DEC 1980	$6.99	$34950
3.	CBOT	11-17-78	Dec 1980	$6.99	$34950
4.	CBOT	11-30-78	APR 1979	$6.13	$30650
5.	COMEX	11-30-78	Apr 1979	$6.15	$30750
6.	CBOT	01-22-79	Feb 1981	$7.43	$37150
7.	CBOT	01-25-79	APR 1981	$7.68	$38400
8.	CBOT	02-07-79	Aug 1981	$8.64	$43240
9.	CBOT	05-01-79	Dec 1981	$9.70	$48500
10.	CBOT	08-08-79	Jun 1982	$11.15	$55750
11.	CBOT	08-31-79	Dec 1979	$10.49	$52475
12.	CBOT	11-27-79	Aug 1982	$21.60	$108000
13.	CBOT	12-10-79	Apr 1982	$23.45	$117250
14.	CBOT	12-31-79	Jun 1981	$32.37	$161860
15.	CBOT	12-31-79	Jun 1981	$31.17	$155860
16.	CBOT	01-02-80	Aug 1981	$33.97	$169870
17.	CBOT	01-03-80	Apr 1981	$34.09	$170470

((Chart 1 at end of footnotes shows reduced original because certain headings were changed in order to reduce the width and render it here. This chart is not all of Michelson's transactions in order of execution, it is merely selected losses in silver,"gains and others never were charted.")

In 1979 and 1980, according to petitioner's expert, Dr. Teweles, silver and to a lesser extent gold, witnessed ' one of the most spectacular bull markets in history". For a number of years before that time silver had hovered around $4.00 to $6.00 a troy ounce. The price began rising in early 1979, and from about mid 1979 through January of 1980, the price rose spectacularly from about $10 to $50 an ounce. As was later learned in investigations by the Congress and by various Federal Agencies, the silver market was manipulated by the Hunt family and the Conti group in an effort to corner the silver market. (see footnote 6) Between January 1979 and January 1980, the price of silver rose 675 percent from $6.50 to $50.35 per troy ounce. On January 21, 1980 prices began to decline and continued to decline

steadily until late March of 1980. On Thursday March 27,1980 (referred to as "Silver Thursday") silver dropped to $10.50 an ounce. The precipitous decline was even more dramatic than the run-up in price. The efforts of the Hunt family and the Conti group to corner the silver market collapsed when they ran short of money and , as Dr. Teweles described the situation, "couldn't keep the play going". The result was, in Dr. Teweles' words , the " most devastating collapse of any futures market in history."

While the market price of silver was rising dramatically and petitioner had not physical silver (no "cash silver" as it is called) , he also had no long positions in silver futures contracts to take delivery of or buy any silver. Petitioner instead continued to enter into short positions and to meet

increasing margin calls on his sort positions despite the advice of a representative of Merrill Lynch that he should be in long positions or at least in some long positions. The Merrill Lynch representative also advised petitioner not to meet margin calls, because, in the representative's opinion, meeting a margin call was merely throwing good money after bad when the market was telling you that you were in the wrong position. Merrill Lynch representatives became more insistent in their advise and finally they told petitioner that the course of action he was pursuing amounted to "financial suicide." For some unfathomable reason, petitioner took Merrill Lynch's advise as some type of threat directed against himself. All of the 17 silver futures contracts listed above by the date on which petitioner

entered into the contract) were closed out with losses on each transaction as follows:

(footnote Chart II.)

#	CLOSED	PRICE	PROCEEDS	LOSS
1.	12-28-79	$29.72	$148610	(-114010)
2.	12-31-79	$30.84	$154210	(-119260)
3.	01-10-80	$36.80	$184000	(-149050)
4.	04-16-79	$7.29	$36450	(-5800)
5.	05-25-79	$8.83	$44175	(-13425)
6.	01-10-80	$37.25	$186250	(-149100)
7.	01-02-80	$32.99	$164970	(-126570)
8.	01-03-80	$35.17	$175870	(-132630)
9.	01-10-80	$39.50	$197500	(-149000)
10.	1-10-80	$40.76	$203845	(-148095)
11	12-04-79	$19.55	$97750	(-45275)
12.	1-10-80	$41.16	$205825	(-97825)*
13.	1-10-80	$40.37	$201860	(-84610)
14.	1-10-80	$38.20	$191000	(-29140)
15.	1-10-80	$38.20	$191000	(-35140)

16.1-10-80 $38.65 $193250 (-23380)

17.1-10-80 $37.75 $188750 (-18280)

*Petitioner failed to claim this loss on his 1980 tax return, but if petitioner otherwise prevails, respondent agrees that loss should be allowed.

(chart II above originally was what is a combined chart I and chart II; in order to include it in the page width we only included the new loss and closing price information on chart II. reading chart I above and chart II together by reference to the number makes it usable here as intended. Chart II as it originally appeared appears reduced at the end of the footnotes with original complete headings. Headings were abbreviated above.)

In each of the 17 transactions summarized above , petitioner was in the short position (a contract to deliver

silver) and, not having any silver to deliver, had to close out the position by offset and always at a price higher than the contract price. The prices at which petitioner agreed to deliver silver under the contracts varied from a low of $6.13 for a contract entered into in November 1978 to a high of $34.094 for a contract entered into on January 3,1980. The prices at which the contracts were closed out varied from a low of $7.29 per troy ounce in April of 1979 to a high of $41.165 on January 10,1980. Petitioner describes the closing of transactions by offset as "switches" and suggests that his "switches" merely extended his delivery dates. However, his "switches" resulted in part of the losses he claims in this case. Also, the rising market price of silver resulted in increased margin calls, each $1.00 increase in the

price of silver making each silver contract (5,000 troy ounces) cost an additional $5,000.

Petitioner's expert testified that in a rising market the place to be is in the long position, not the short position. Dr. Teweles further testified that when prices rise the person in the short position get increasing margin calls but for the person in the long position " the increase in price, of course, would be delightful". Except perhaps in the sense of offsetting his positions in lieu of delivery, the record does not establish that petitioner ever entered into a long position in any of his silver futures contracts. Of all of the transactions involved in the net losses claimed in this case, in only two transactions (five contracts for December 1980 copper and seven contract

for February 1980 gold) was petitioner in the long position. The five contracts for December 1980 copper, entered into on February 9,1979 ,were closed out by offset on October 4,1979 at a profit of $21,625. The seven contracts for February 1980 gold , entered into on January 7,1980 ,were closed one day later and resulted in a loss of $9,735.50 Petitioner's explanation of this one day foray was that he was somehow 'testing the liquidity of the market" in gold.

Petitioner continued to meet all margin calls on his silver contracts, which were quite substantial. Finally, on January 10,1980, the New York office of Merrill Lynch, acting in what it regarded as its fiduciary duty and obligation to protect its customer (i.e. to protect petitioner from himself) , liquidated and closed all of petitioner's positions in

his commodity account. The record is not entirely clear as to whether petitioner had failed to meet Merrill Lynch's last margin call. The period for meeting a margin call for a commodity account is briefer than for a stock account. The record does not show when petitioner received that last margin call or the deadline to meet it. Petitioner denied that he failed to meet that margin call and insisted that on January 11,1980 he went to the local office of Merrill Lynch in Albuquerque with the money to meet the call, only to learn that his positions had been liquidated the preceding day.

Thereafter Merrill Lynch brought suit against petitioner for the deficit balance in his commodity account, and petitioner counterclaimed against Merrill Lynch for, among other things, the alleged improper liquidation of his

commodity positions. That litigation was still pending at the time of the trial of this case. (see footnote 7 at end) . Of the $1,303,976.30 losses claimed by petitioner in 1980 , $1,034, 930. of that amount resulted when Merrill Lynch liquidated the remaining positions in petitioner's account on January 10,1980.

The 17 silver futures contracts detailed above plus a few futures transactions in copper and gold resulted in the losses of $304,895 for 1979, and $1,303, 976. for 1980. (see footnote 8 at end)

After the losses in the commodity futures transactions were sustained in 1979 and 1980, petitioner for the first time filed schedule c's with his tax returns. ON those schedule c's , petitioner claimed to be a dealer in metals and claimed to the losses as

ordinary losses rather than capital losses. (see footnote 9)

On audit respondent disallowed $31,170 of the total interest expense of $72,000 claimed by petitioner in 1978 on his schedule a. The claimed interest expense involved $17, 249 to Merrill Lynch and $13,921 to EF Hutton. Respondent conceded at the beginning of the trial that $31,016.80 of that amount is properly deductible as a schedule a interest expense item, as follows: Merill Lynch $17,248.71, and EF Hutton $13,768.09. There is no evidence in the record in regard to the balance of the interest disallowed. The EF Hutton statement for the month of December 1978 merely shows the amount charged and is not proof that petitioner in fact paid that amount in 1978.

In support of his deductions of interest paid to Merrill Lynch on his margin account in 1979, petitioner submitted one page of a Merrill Lynch statement on Account 433-13024 (not the commodity account) for the month of December 1979. That statement shows a margin interest charge for the month of December of $4,370. (actually $4369.59) and a year to date amount of $29,576. Petitioner argues that this statement shows the "charge was a reduction in the balance" and hence constituted payment. However, both the opening and closing figures on that account were negative, and the court cannot find that the amount of interest was actually paid in 1979 by petitioner, a cash basis taxpayer. Similarly, the EF Hutton statement for December 1979 shows a charge of $20,864.67 for margin interest, but there

is no evidence that petitioner actually paid that amount in 1979. Respondent determined that petitioner had paid margin interest of $26,920 to Merrill Lynch and $15,908 to EF Hutton. Petitioner has not proved that he paid any amounts of margin interest in 1979 in excess of the amounts allowed by respondent. For 1980 respondent increased petitioner's interest expense deduction, but treated all of it as a schedule a itemized deduction.

As to various expense itemized on petitioner's schedule c for 1981 that respondent disallowed on audit, respondent at the beginning of the trial conceded that certain items had been substantiated but respondent takes the position that these items are only deductible on schedule a as deductions under section 212. There is no evidence

in the record to support either the amount or the deductability of any remaining schedule c items disallowed.

ULTIMATE FINDINGS OF FACT

1. Petitioner was not engaged in a trade or business as a dealer in metals n 1979 and 1980.

2. The losses petitioner sustained in 1979 and 1980 in certain commodity futures transactions were not hedging losses.

3. IN his commodity futures transactions in 1979 and 1980 , petitioner was acting as an investor or as a speculator on his own account and the losses he sustained were capital losses.

4. As to the portion of the 1980 loss attributable to Merrill Lynch's liquidation of his commodity account, petitioner has not established that the

portion of the loss was " sustained " in 1980.

5. Petitioner has not established that he paid interest on hsi margin accounts with MerrIll Lynch and EF Hutton in excess of the amounts allowed by respondent.

OPINION

The primary issues in this case is the proper characterization of the net losses on commodity futures, principally silver futures, as ordinary or capital. This depends on whether the commodity futures were "capital assets" within the meaning of section 1221. The term "capital assets" is defined in section 1221 as "property held by the taxpayer (whether or not connected with his trade or business)," with certain specific exceptions. The only exception on which petitioner can rely is section 1221 (1)

which excludes from the term "capital asset" "stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. "

Petitioner contends he was a dealer in metals and the commodity futures contracts were hedging transactions integral to his trade or business as a metals dealer. Respondent contends petitioner was a speculator trading on his own account or an investor, either of whom hold the commodity futures as a capital assets. IN various contexts the terms, "dealer," trader" , and "investor" become significant for Federal tax purposes.

In different contexts where the tax issue turns on whether or not the person is engaged in a trade or business, a distinction is drawn between a trader (one dealing on his own account in securities or commodity futures) who is considered to be engaged in a trade or business and an investor who is not. Higgins v. Commissioner, 312 US 212 (1941) (business expense deduction under predecessor of section 162); Moller v Commissioner, 721 f2d 810 (fed cir 1983) (office in the home expense under section 280a); King v Commissioner, 89 TC 445, (1987) investment interest limitation under section 163 d (see footnote 10 at end) See also Groetzinger v Commissioner, 82 TC 793, 800-801 (1984) affd 771 f2d 269 (7th cir 1985) affd 480 US 23 (1987). However, the characterization of property as a

"capital asset" vel non does not turn on whether the taxpayer is engaged in a trade or business, whether he has a business motive for acquiring or holding the property, or whether the property is "connected with his trade or business."sec 1221. Arkansas Best Corp v. Commissioner 485 US 212 (1988) Thus, the distinction between a trader and an investor has no bearing on the determination of whether securities or commodity futures are capital assets in the hands of the particular taxpayer since such securities or commodity futures would be capital assets in the hands of either a trader or an investor. King v Commissioner 89 TC at 458 and n5.

In transactions involving securities or commodity futures, a distinction is also drawn between a trader and a dealer. Whether a particular taxpayer is a dealer

or a trader is a question of fact. Kemon v Commissioner 16 TC 1026 (1951) In Kemon, 16 TC at 1031, 1033 ,we explained the distinction between a dealer and a trader as follows: "In determining whether a seller of securities sells to "customers" the merchant analogy has been employed... Those who sell to customer are comparable to a merchant in that they purchase their stock in trade, in this case securities, with the expectation of reselling at a profit, not because of a rise in value during the interval of time between purchase and resale, but merely because they have or hope to find a market of buyers who will purchase from them at a price in excess of their cost. This excess or mark up represents renumberation for their labors as a middle man bringing together buyer and seller, and performing the usual

services of retailer or wholesaler or goods...Such sellers are known as "dealers".

Contrasted to " dealers" are those sellers of securities who perform no such merchandising functions and whose status as to the source of supply is not significantly different from that of those to whom they sell. That is, the securities are as easily accessible to one as the other and the seller performs no services that need be compensated for by a mark-up of the price of the securities he sells. The sellers depend upon such circumstances as a rise in value or an advantageous purchase to enable them to sell at a price in excess of cost. Such sellers are known as "traders".

See also Adnee v. Commissioner, 41 TC 40 (1963) (see foootnote 11)

Petitioner tries to bring himself within this "merchant analogy". Petitioner does not, however, claim to be either a dealer or a trader in commodity futures. IN fact, he denies any dealing in commodity futures, insisting that he deals not with commodity futures but with the physical metals themselves. See n 4 supra. Petitioner says he is a dealer in metals, that he earns his living buying metal for his "inventory" and selling metals from this "inventory". He insist the commodity futures were merely hedging transactions in connection with his metals business, apparently invoking the presumed judicial exception of Corn Products REfining co v Commissioner, 350 US 46, (1955) to section 1221. However, see and compare Arkansas best Corp v Commissioner supra. . Unfortunately for petitioner, the record in this case

simply does not establish that he had any trade or business separate and apart from his transaction on the commodity exchange.

The court reaches that conclusion despite the fact that petitioner over the years had acquired some copper and gold that he held by means of negotiable warehouse receipts. He had held that metal for rather long periods of time , two years or more, having acquired it in the period from 1974 through 1977. Thus the metal itself had the characteristics of an asset held for investment purposes , a capital asset, and not an "inventory" item. Moreover, that metal too was acquired through transactions on commodity exchanges. There is no evidence in the record that petitioner ever acquired any metal directly from a refinery or any other off exchange

supplier. Also, while petitioner did own this copper and gold , he never owned any silver, and most of the losses in this case involved silver futures. see n 5. supra. Finally , the record reflects no frequent sales of metals by petitioners to customers, or related merchandising activity, such as advertising and sales calls, of sufficient frequency and scope to rise to the level of a "trade or business". Groetzinger v Commissioner, supra.

Petitioner's expert, Dr. Teweles, testified that petitioner's commodity account with Merrill Lynch was a hedging account. However, it is evident from his testimony that Dr. Teweles believed that petitioner was engaged in some business separate and apart from the commodity futures transactions themselves. Dr. Teweles' contacts with petitioner in

advance of the trial were quite minimal . The court is satisfied that Dr. Tewweles did not have the slightest inkling that petitioner's alleged metals business was nothing more than these commodity futures transactions themselves. Also, even as to his characterization of the commodity account as a hedging account, Dr. Tewlees relied upon his belief that Merrill Lynch had determined that the account was a hedging account. Dr. Teweles agreed that if Merrill Lynch had not determined it to be a hedging account, his conclusion would be different. Merrill Lynch regarded the account as a speculative account , at least by 1979 and 1980 see n 2 supra. While Dr. Teweles is a well qualified professor of finance and knowledgeable in the commodities field , his conclusions were based upon misconceptions of the underlying facts of

this case. Accordingly , the court disregards Dr. Teweles conclusions as unsupported by the facts of record.

It is clear to the Court that petitioner is trying to concoct a trade or business out of his commodity futures transactions. Petitioner says he is in the physical metals business (which the record does not support), that these commodity transactions involved the same kind of physical metals in which he allegedly dealt (which is contrary to the record, particularly in regard to silver) and that that makes his losses ordinary rather than capital losses. So far as the record shows, the transactions in commodity futures in 1979 and 1980 did not differ from petitioner's earlier commodity futures transactions from 1974 through 1978 when he was admittedly an investor, reporting income from interest,

dividends, and capital gains. It was only after he sustained the huge losses during the Hunt family silver debacle that petitioner for the first time filed schedule c's and claimed to be a a dealer in metals.

As the facts of this case establish, petitioner was an investor or a speculator trading on his own account in commodity futures. He performed no merchandising functions. He had no customers who regularly purchased either commodity futures or metals in the ordinary course of business. As we noted in Kemon v Commissioner 16 TC at 1033, petitioner's "source of supply" (the commodity exchanges) was not significantly different from that of those to whom he sold (those on the opposite side of his commodity futures contracts). All of petitioner's commodity

transactions were handled through Merrill Lynch. He was not licensed to sell commodity futures nor was he a member of any commodity exchange. See Mirro-Dynamics v. United States, 374 f2d 14,(9th cir. 1967) cert denied 389 US 896 (1967). Nor was petitioner engaged in any separate business which utilized copper, gold, or silver. Thus, the commodity futures transactions were neither a hedge against raw materials used in a business nor purchases to insure a steady supply of raw material. Corn Products Refining co. V Commissioner, supra; Sicanoff Vegtable OIl Corp v Commissioner, 27 TC 1056, (1957) revd on other grounds 251 f2d 764. (7th cir (1958).

Petitioner's short positions in silver could not guarantee him a minimum sales price since he had no silver to

sell; his short positions could not provide him with any supply of or promise of supply of any silver such as a long positions might have. Thus, petitioner's reliance on the example of a corn farmer engaging in futures transactions is completely inapt. The corn farmer with a corn crop growing n the field enters into a futures contract to deliver or sell corn at a certain price (short positions) to guarantee a minimum price at which he can later sell his crop; the corn farmer may also enter into futures contracts to receive delivery of or buy corn at a certain price ("long positions ") to guarantee a supply of corn at a certain price if his corn crop should fail or fall short of his expectations. petitioner cannot come within this traditional type of hedging transaction as he argues. Nor can petitioner bring

himself within the judicial exception of the Corn Products doctrine, which at a bare minimum requires that the taxpayer have some separate trade or business apart from the commodity futures transactions themselves. (see footnote 12)

Never the less, Dr. Teweles attempted to label petitioner's commodity futures transactions as an "anticipatory hedge" , even if he did not own any silver at the time. Again, Dr. Teweles was assuming, contrary to the facts, that petitioner was engaged in a metals business separate and apart from the commodity futures transactions themselves . Since petitioner did not have any other business and since he did not have and had never had any silver in his so called "inventory" , the logic of the situation is that petitioner was gambling that

silver prices would fall and that he could obtain the silver at prices less than the prices in his short positions. There is an indication in the record that petitioner believed the Federal Government would step in and force down the price of silver. That did not happen. With the price of silver continuing to escalate dramatically during the Hunt family's foray into the silver market, petitioner, against the advice of his broker, continued to enter only short positions to deliver silver he did not have and silver which he could obtain (actually or by offset) only at ever increasing prices. The Court agrees with Merrill Lynch's warning to petitioner that this was tantamount to "financial suicide." petitioner's transactions simply do not come with the merchant category, either actually or by analogy.

As the Supreme Court's opinion in Arkansas Best Corp. v Commissioner , supra , teaches us, section 1221 defines "capital asset" broadly, the statutory exceptions are the exclusive exceptions to that definition, the motive with which the taxpayer acquires or holds the property is irrelevant (i.e. that the taxpayer acquires or holds the property for a business purpose is irrelevant), an whether the property is "connected with his trade or business" is irrelevant. What is determinative, the Supreme Court teaches us, is whether the taxpayer can bring himself within one of the specific statutory exceptions to the definition of "capital asset" . The Corn Products case itself involved the application of section 1221's inventory exception, with the Supreme Court stating therein, (350 US at 50) that the company's futures

transactions were "an integral part of its business designed to protect its manufacturing operations against a price increase in its principal raw material and to assure a ready supply for future manufacturing requirements. " As our findings of fact and the discussion above amply demonstrate, petitioner had not metals business apart from the commodity futures transactions themselves. Petitioner was speculating on his own account. What we said in Kemon v Commissioner, supra 16 TC at 1032,in regard to securities is equally applicable to commodity futures , namely, "Whether or not securities are held primarily for sale to customers in the ordinary course of business is a question of fact, Stern Brother and co. 16 TC 295, in which the crucial phrase is "to customers." This phrase and the word

"ordinary" were added to the definition of capital assets by Senate Amendment no 66 n the Revenue Act of 1934 so that a speculator trading on his own account could not claim the securities he sold were other than capital assets. The theory of the amendment was that those who sell securities on an exchange have no "customers" and for that reason the property held by such taxpayers is not within the above quoted exclusionary clause. DL Burnett, 40 BTA 605, 118 f2d 659, Thomas E wood 16 TC 213."

Those who merely buy or sell on a commodity exchange, as petitioner did , have not "customers" and are not engaged in a trade or business as a merchant, either actually or by analogy. The court concludes that petitioner was either an investor or a speculator trading on his own account as to these commodity

futures. In either capacity, the commodity futures contracts were capital assets in his hands and his losses therefrom were capital losses.

In the notice of deficiency for 1980, respondent alternatively determined that petitioner had not established " that transactions which occurred on or about January 10,1980 as a result of the liquidation of your brokerage account were closed transactions or that there was not reasonable prospect of recovery with respect to the losses ($1,034,930.) claimed. ..."

The issue having been raised in the notice of deficiency, petitioner bears the burden of proof. Welch v. Helvering, 290 US 111, 115, (1933) rules 142a. Petitioner has failed to sustain that burden.

The record contains little information about the litigation between Merrill Lynch and petitioner. See n 7 supra. However, in that litigation petitioner counterclaimed against Merrill Lynch contending the liquidation of his commodity account was improper. That litigation was still pending at the time of the trial of this case. We agree with respondent that petitioner has not established that in 1980 there was no reasonable prospect of recovery with respect to #1,034,930 of the loss claimed for that year. Accordingly, we cannot find that the portion of the 1980 loss was "sustained" in that year. Sec 1.165-1 d 2 i, Income tax regs.

The final issue is the interest on petitioner's margin accounts with EF Hutton and Merrill Lynch . Section 163 a allows as a deduction "all interest paid

or accrued within the taxable year on indebtedness." The narrow issue is the amount such margin account interest that petitioner, a cash basis taxpayer, actually paid in each of the year , 1978, 1979, and 1980. The EF Hutton and Merrill lynch statements upon which petitioner relied merely show the amount of such interest that was charged by EF Hutton or Merill Lynch each year. Those statements do no prove the amount that petitioner actually paid each year. Petitioner has not established that he actually paid any margin account interest in excess of the amounts allowed by respondent.

To reflect respondent's concessions and the above holdings,

Decision will be entered under rule 155.

FOOTNOTES;

(Footnote 1)While respondent concedes that various expenses have been substantiated and are deductible, respondent does not agree that these are schedule c business expenses. Respondent contends that they are instead deductible under section 212. An issue was raised as to the statute of limitations for the taxable year 1981, but the parties' oral stipulation on the record as to the date of mailing of the deficiency notice and PS form 3877 (stipulated) into evidence show that the notice was timely mailed; petitioner received the notice and timely filed his petition in this Court. That disposes of the statute of limitations issue. Mulvania v Commissioner, 81 TC 65 (1983) Frieling v Commissioner 81 TC 42 (1983). Petitioner's further arguments on this matter are frivolous.

(footnote 2.)This dispute consumed much trial time and seems to loom large in petitioner's view of the case. Petitioner seeks to draw the issue narrowly as to whether his commodity account was a trade or hedging account or a speculative account, apparently assuming that if it can be characterized as a hedging account that automatically guarantees ordinary loss treatment for Federal income tax purposes. Petitioner's expert Dr. Richard J. Teweles , concluded that petitioner had a hedging account, but based his conclusion on the fact that Merrill Lynch had, he (Dr Teweles) believed, determined that it was a hedging account. Dr. Teweles relied almost entirely on what he thought was Merrill's determination. Dr. Teweles candidly admitted that if Merrill Lynch had not determined it to be a hedging

account, then his conclusion would be different. A representative of Merrill Lynch testified that the account number was that of a speculative account rather than a hedging account and that petitioner was using the account in 1979 and 1980 to speculate. We need not, however, resolve the dispute. Whether this commodity account in 1979 and 1980 was a hedging account or a speculative account may well have significance for purposes of the Commodity exchange act, 7 USC secl, et seq., and the regulations of the various commodity exchanges and probably for purposes of Merrill Lynch's determination of proper margin calls on petitioner's account, but is not determinative of the tax issues before the Court. If it were necessary to make a finding, we would accept the testimony of the Merrill Lynch representative and find

that in 1979 and 1980 petitioner had a speculative account or at least was using his account to speculate.

(footnote 3) The record is not clear that this copper and gold metal generated the commodity expenses or commodity storage fees that petitioner deducted on his schedule a's in 1976 ,1977, and 1978. However, the 1,510,225 pounds of copper and 400 ounces of gold petitioner held January 1, 1979, are the only actual physical metal that petitioner has established that he ever owned in the period from 1974 through the end of 1980. The record, although quite extensive with over 1,000 pages of transcript, is singularly devoid of any information as to petitioner's alleged transactions in metal , other than the few transactions on the commodity exchange that resulted in the large losses claimed on his 1979

and 1980 tax returns, which are the subject of this lawsuit.

(footnote 4) While petitioner denies he dealt in commodity futures contracts and insists he dealt only in the actual physical metals themselves, he is either engaged in a semantical quibble over words or his argument is not supported by the facts of record.

(footnote 5) When pressed on this point, petitioner insisted he did own some silver (the physical metal as opposed to commodity futures contracts for silver). However, he then conceded that the silver he owned was silver coins, which were not in proper form for delivery on an exchange and which he regarded as collector's items held for investment purposes.

(Chart I) insert

(footnote 6) Petitioner devoted much of the trial time to the details of this attempt to corner the silver market, a matter which apparently is involved in his ongoing litigation against Merrill Lynch and various other brokerage firms and individuals. However, it is not necessary in this case to go into the details of that attempt, a comprehensive statement of which is set forth in H Rept. no 97-395 (1981) entitled "Silver Prices and the Adequacy of Federal Actions in the Marketplace, 1979-80, Seventeenth Report of the Committee on Government Operations together with Separate and Dissenting Views." While that 173 page report outlines various problems, there was little unanimity on the matter and most of the complex financial and regulatory issues are still unresolved or in litigation in various

courts in numerous lawsuits. There seems to be agreement that the Hunt family, and the Conti Group got control of large concentrations of physical silver (referred to as "cash silver" and also used the futures market for additional deliveries of case silver.

(footnote 7) Petitioner offered into evidence a copy of a Memorandum Opinion and Order of the United States District Court for the District of New Mexico , filed August 12,1982. Petitioner offered that document because of the statement on the first page that "Defendant Michelson is a dealer in precious metals," asking us to take judicial notice of that fact. We refused to receive the document for that purpose. As we have pointed out in other cases, "The mere fact that court in one opinion makes findings of fact is not a basis for the same or another court in

another proceeding to take judicial notice of those findings and to deem them to be indisputably established for purposes of the pending litigation." Estate of Reis v. Commissioner 87 TC 1016, 1028-29 (1986) . Se also Moore v Commissioner, TC Memo 1989-306. Moreover, respondent is not a party to nor in privy with any party to that Merrill Lynch-Michelson litigation; the matter came up on plaintiff Merrill Lynch's motion for summary judgment and was not an adjudication on the merits. Also, we do not know whether MIchelson's status as "a dealer in precious metals" was in issue in that case. IN any event, that case would not be determinative of his status for Federal tax purposes. Finally, we may take judicial notice of adjudicative facts not subject to reasonable dispute which are either generally known within

the jurisdiction of the Court or capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Petzoldt V Commissioner 92 TC 661, 674, (1989). Petitioner's status as a dealer in metals vel non is not such a fact. That district Court Memorandum Opinion and Order, while not admitted into evidence, remains associated with the files of the present case. That document does not cast much light on the issues that the District Court disposed of by summary judgment nor does it tell us anything about the issues that remain in controversy in that litigation. Other than that document there is no information in our record in regard to the pending Merrill Lynch-Michelson litigation.

(Footnote 8) Petitioner denies that he claimed losses, but that is the bottom

-line result. As a matter of mechanics, for 1979 petitioner reported the proceeds on the sale of certain copper (the physical metal or "cash copper") on a schedule c as gross receipts or sales of $460,050. Petitioner then treated the so called "hedging losses" of $304,895 as an adjustment to "inventory," i.e. ,as the alleged cost of acquiring additional "inventory" , and thus effectively deducted the losses as part of costs of goods sold. Similarly, for 1980 petitioner reported proceeds on the sale of some more copper and the 400 ounces of gold as gross receipts or sales of $733,335. Petitioner than treated the so called "hedging losses" of $1,303,977. ass an adjustment to "inventory", I.e. as the alleged cost of acquiring additional "inventory" ,and thus effectively deducted the losses as part of costs of

goods sold. The copper was sold in transactions on the commodity exchange by actual delivery but the gold was sold din an off exchange transaction to a bank in Canada. The $302,000 proceeds from the gold sale and the $431,335 from the copper sales were used to pay off petitioner's loan from the First National Bank of Albuquerque. On November 7,1979, the bank had made another loan to petitioner, and as a result held petitioner's note for $720,000 and also held the certificate for the gold and the warehouse receipts for the copper as additional collateral on that loan.

(footnote 9) These schedule c's were prepared by petitioner himself and submitted to his accounting firm Peat Marwick, Mithchell. The accounting firm simply recopied the schedule c as prepared by petitioner; the accounting

firm did not conduct any audit, review, or verification of any of the figures or of any underlying documentation. Petitioner's attempt to suggest otherwise was refuted by the crystal clear and candid testimony of the Peat Marwick Mitchell representative whom the court found to be wholly credible and worthy of belief. Petitioner's testimony in regard to the preparation of the schedule c was deceptive and lacking in candor. The peat Marwick Mitchell representative also testified that the accounting firm did not maintain petitioner's books and records, but merely prepared petitioner's tax returns, another matter on which petitioner was less than candid with the Court.

(footnote 10) See also Asch v Commissioner, TC memo 1986-238; Zambakian v Commissioner ,TC Memo 1986-219.

(footnote 11) See also Huebschman v Commissioner, TC Memo, 1980-537; Ferguson v Commissioner, TC memo, 1974-244.

(footnote 12) We need not and do not address the question of whether the Corn Products doctrine retains any vitality after the Supreme Court's opinion in Arkansas Best Corp v Commissioner, 485 US 212,(1988). Suffice it to say here, even before the Supreme Court's Arkansas Best opinion and even assuming the full vitality of the Corn Products doctrine in its most expansive interpretation, petitioner could not prevail.

CHART I

Exchange	Date of Contract	Delivery Month & Year	Price Per Troy Ounce*	Contract Price (Proceeds to be Received for Delivery of 5,000 Troy Ounces of Silver)
CBOT	11-16-78	Dec. 1980	$6.9200	$34,600
CBOT	11-17-78	Dec. 1980	6.9900	34,950
CBOT	11-17-78	Dec. 1980	6.9900	34,950
CBOT	11-30-78	Apr. 1979	6.1300	30,650
COMEX	11-30-78	May 1979	6.1500	30,750

*The prices are carried out to the fourth decimal place merely because they are shown that way on the Merrill Lynch statements (but without the decimal points which the Court has added for clarity, since otherwise the "69200" might be mistaken for $69,200 instead of $6.92).

In 1979, petitioner entered into 10 more commodity futures contracts to deliver silver as follows:

Exchange	Date of Contract	Delivery Month & Year	Price Per Troy Ounce	Contract Price (Proceeds to be Received for Delivery of 5,000 Troy Ounces of Silver
CBOT	01-22-79	Feb. 1981	$ 7.4300	$ 37,150
CBOT	01-25-79	Apr. 1981	7.6800	38,400
CBOT	02-07-79	Aug. 1981	8.6480	43,240
CBOT	05-01-79	Dec. 1981	9.7000	48,500
CBOT	08-08-79	Jun. 1982	11.1500	55,750
CBOT	08-31-79	Dec. 1979	10.4950	52,475
CBOT	11-27-79	Aug. 1982	21.6000	108,000
CBOT	12-10-79	Apr. 1982	23.4500	117,250
CBOT	12-31-79	Jun. 1981	32.3720	161,860
CBOT	12-31-79	Jun. 1981	31.1720	155,860

In early 1980, petitioner entered into two additional commodity futures contracts to deliver silver as follows:

Exchange	Date of Contract	Delivery Month & Year	Price Per Troy Ounce	Delivery of 5,000 Troy Ounces of Silver)
CBOT	01-02-80	Aug. 1981	$33.9740	$169,870
CBOT	01-03-80	Apr. 1981	34.0940	170,470

CHART II

Date of Contract	Price Per Troy Oz.	Contract Price (Proceeds to be received for delivering 5,000 oz.)	Date Closed Out (by offset)	Price Per Troy Oz. to Close Out	Amount to Close Out Position (Price x 5,000 Oz.)	Loss on Transaction*
11-16-78	$ 6.9200	$ 34,600	12-28-79	$29.7220	$148,610	($114,010)
11-17-78	6.9900	34,950	12-31-79	30.8420	154,210	(119,260)
11-17-78	6.9900	34,950	01-10-80	36.8000	184,000	(149,050)
11-30-78	6.1300	30,650	04-16-79	7.2900	36,450	(5,800)
11-30-78	6.1500	30,750	05-25-79	8.8350	44,175	(13,425)
01-22-79	7.4300	37,150	01-10-80	37.2500	186,250	(149,100)
01-25-79	7.6800	38,400	01-02-80	32.9940	164,970	(126,570)
02-07-79	8.6480	43,240	01-03-80	35.1740	175,870	(132,630)
05-01-79	9.7000	48,500	01-10-80	39.5000	197,500	(149,000)
08-08-79	11.1500	55,750	01-10-80	40.7690	203,845	(148,095)
08-31-79	10.4950	52,475	12-04-79	19.5500	97,750	(45,275)
11-27-79	21.6000	108,000	01-10-80	41.1650	205,825	(97,825)**
12-10-79	23.4500	117,250	01-10-80	40.3720	201,860	(84,610)
12-31-79	32.3720	161,860	01-10-80	38.2000	191,000	(29,140)
12-31-79	31.1720	155,860	01-10-80	38.2000	191,000	(35,140)
01-02-80	33.9740	169,870	01-10-80	38.6500	193,250	(23,380)
01-03-80	34.0940	170,470	01-10-80	37.7500	188,750	(18,280)

*Petitioner on his tax returns computed the losses resulting from the contracts closed in 1979 exclusive of broker's commissions and fees, but computed the losses resulting from the contracts closed in 1980 inclusive of those commissions and fees. For consistency, the Court has listed all of them exclusive of those expense items.

**Petitioner failed to claim this loss on his 1980 tax return, but if petitioner otherwise prevails, respondent agrees that loss should be allowed.

92-442

Supreme Court, U.S.
FILED
JUN 15 1992
OFFICE OF THE CLERK

No...

IN THE

SUPREME COURT

of the

UNITED STATES OF AMERICA

March term 1992

DOUGLAS J. MICHELSON,

petitioner,

vs

COMMISSIONER OF INTERNAL REVENUE,

respondent,

Petition for Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

APPENDIX B

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

RECONSIDERATION BRIEF IN CHIEF

is included here in order to understand references in the petition for certiorari, and to understand the points which were at issue but the Court of Appeals would not address, or addressed inadequately.

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STATEMENT OF THE CASE

Appellant-Petitioner, Douglas J. Michelson (referred hereinafter as Michelson) started his effort to be in the metal business full time in 1978. In 1978, deliverable in August 1980, he entered a great number of the contracts in dispute in this case. He focused on the niche of a wholesale metal dealer, who bought or sold metal from his inventory. In early 1979 he sold copper and silver. The $460,050 in business on his books by April 1979 would have required filing a schedule c. The interceding event which ruined his business and sapped his working capital was the creation of a corner in the

silver market by Hunt, etal.It occurred from Sept 1979 till April 1980. Michelson took action switching delivery dates forward in December 1979. He filed his 1979 return April 1980. M L sued him. Congress in May 1980 went public with hearings on the silver market, providing the names and details of the major conspirators in the corner. Michelson during 1980 did $733,050 in metal sales. In April 1981 he filed the 1980 tax return. In 1983 Michelson sued Hunt,et al. All books and records which IRS requested were immediately provided them. On April 3,1984 a notice of deficiency was issued on two years. June 12, 1984 a petition was filed in Tax Court. IRS Notice recategorizes him out of the metal business. They identified his losses brought on by the corner in the market as

sham straddles and disallowed them. They disallow expense deductions per section 162, and NOL carryback per section 172. They disallow 1980 hedging losses for 1980, and claim they are subject to recovery. From 1976 till 1981 Merrill lynch and others had promoted tax avoidance by the use of straddles. By 1984 Congress decided to act to clarify to clarify where all the commodity dealers were on the IRS carpet, as well as anyone who had done commodity futures transactions. That is enshrined in the legislation detailed in point 3. The Tax Court had made several rulings favorable (Swan and Fox),to the theory under which the Notices were issued. In 1985 **Miller, Gilbert,v CIR** issued en banc by the Tax Court adhered to the Congressional mandate and overrode two previous cases.

It was suppose to put a stop to the IRS hauling the commodity dealers into court for transactions prior to 1982. Michelson has tried everything to communicate with IRS, and resolve this suit, and with the Court to set it up for a proper ruling. The court would not take proper action on critical motions. The trial went forward with its bad proceedings which this court can read in the record. After trial, briefs were submitted. Another month passed, and Michelson wrote letters to the court requesting immediate rulings on all things. Two years pass with more unanswered letters. In 1988 the Supreme Court decided a case called Arkansas Best. IRS has since latched on to it as a way to argue. In 1991 Judge Parker rules for IRS on all issues. Michelson hires counsel at a huge prepaid fee, to leave

no stone unturned. The lawyer does little and files an unhelpful brief and then he casts terribie aspersions on me filing a motion to withdraw, and miscommunicates more. Your honors move on your busy calendar. I am unable to know what is going on. Three weeks after ruling he sends it in the mail. I file an appearance to save this miscarriage of justice.

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*SUGGESTED FOR EN BANC CONSIDERATION

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

DOUGLAS J. MICHELSON,)
Petitioner-Appellant,)
)
v.
no 90-9020
COMMISSIONER OF INTERNAL REVENUE,)
Respondent-Appellee.)

ON APPEAL FROM THE DECISION OF THE
UNITED STATES TAX COURT
TAX COURT NUMBERS 8130-82, 18686-84 AND
16775-85

D.J. Michelson, Albuquerque, New Mexico on the brief for reconsideration and en banc hearing for petitioner-appellant.

Shirley D. Petereson, Assistant Attorney General , And Gary R. Allen, Kenneth L. Greene, and Steven W. Parks, Department of Justice, Washington, D.C. for respondent- Appellee.

Before MCKAY, Chief Judge and BARRETT and BRORBY, Circuit Judges.

BRIEF ON POINTS FOR RECONSIDERATION

OR EN BANC HEARING

-Point 1-

Corn Products Refining co vs CIR 1955, 350 US 46, 76 s ct 20 110 led 29 and Monfort v US (1977) ca 10, 561 f2d 190, attg (a976), 406 f supp 701, governs consideration in the 10th Circuit of whether the transactions herein were

speculative in the context of a commodity dealer.

Since the tax court ruling and initial affirmation obscures that or overrides it as precedent, rehearing should be en banc.--- US v Lewis ca La 1972 475 f2d 571 rehearing denied 472 f2d 1405. Because Judge Parker does not follow precedent from this case and in other cases and areas of exceptional importance, reconsideration addressing them properly is in order.--- CIR v Textile Mill Security corp CA 3 1944, 117f2d 62, affirmed 62 s ct. 272, 314 US 326, 86 led 249 For additional reasons stated in the rehearing and en banc motion, rehearing is necessary and en banc preferable.

Monfort also governs treatment of hedging contracts which becomes part of costs of goods sold because delivery is

not made or taken under a contract made on a recognized commodity exchange. These would normally be lumped together under hedging, an adjustment to costs of goods sold. It would also cover the burden to be properly placed on IRS for recategorization of inventory transactions already chosen pursuant to the code. Tax law in 1968 existent for the MONFORT case was nearer 1979 tax law, than the tax law after 1982 seen misapplied herein. It was the law of the case for this circuit herein. It was the case law relied on in 1979 and at trial.

Expert economist, Dr. Teweles, at trial testified that in his opinion based on his experience, education and investigation," Michelson was a dealer acting in good faith."(t-245) and the transactions within the context given were anticipatory hedges.(t-245) His

investigation showed that there was no speculative trades in the account as he found no other commodities such as soybeans in the metal business, or too large a position. Anticipatory hedges are one of the most used commercial methods in the markets, and was common trade practice. IRS has no expert to rely upon to rebut the testimony. Nor are the underlying facts controvertible. pg30 (569) of Judge Parker's opinion incorrectly holds "petitioner was gambling". This Court must correct the conflict seen and conform it to what she has taken judicial notice of under the law (CEA sec 2 (a)(1)(a) . Michelson was engaged in the buying and selling of a commodity on a board of trade. see also CEA sec 3.

That the expert testimony of Dr. Teweles and Mr. Marron is correct is

enhanced in probability in the trial setting because IRS did not present an expert to controvert. Thus the meager burden of more likely than not which the trial court was required to find under easily must find for petitioner on the evidence.

Post trial briefing brought this to the lower Courts attention, suggesting that no expert testified because none would contradict from the facts given. Judge Parker, ignored this and this Court should enforce proper inference to their lack of expert. Ruling that the evidence proved Michelson was a dealer is necessary. It is not Dr. Teweles opinion alone that is very persuasive, but all the evidence seems to be in support.

The ultimate findings of fact as stated in the judgment are stated in the negative and thus very hard or impossible

to prove, in addition to being unsupported by any evidence rightly weighted. They are improperly formed for ruling in this situation. While asserting certain transactions in the business were speculative is within the authority of IRS, per Monfort, to exclude Michelson by law from being a dealer is not, Traux.

The burden to show this reviewing Court that error was made is what would convince a person a mistake had been made, taking what is favorable to the prevailing party below. First look to those errors of law and then to the bias and procedural abuse and trial prejudice and the objective and subjective evaluations of critical facts and a reasonable conclusion is that a mistake was made in the lower court in judging a situation that was not much of taxpayers making. However, it was the risk of

being in that business during that time and he should receive treatment in accord with that as other metal business's did. In the court below the burden of proof on issues is the same as a civil suit tried to the bench in the First Circuit. For most issues it would be more probable than not or a preponderance of the evidence. Wigmore on Evidence #2494. Since within the trial setting petitioner was not given a fair trial or an unbiased Judge, the reviewing court must consider some of the record as it would have been absent the inadmissible and other erroneous rulings and abuse from the bench, if they are. Because the truly weighty issue are errors of law or misapplication, and the proper standard there is de novo, most in the record can be weighted in the discretion of the Court, more probable than not an error

was made, rather than the facts clearly erroneous standard calling for a scintilla of support. Wrong citation by prior counsel is pointed out. That does not mean that it is not still a tax case, and the consideration that holds, or that the trial judge deserves deference. But because much is question of law on issues overruling precedent in this circuit or where there is intercircuit need of husbanding the law, or new consideration on Supreme Court law as applied to this area it all can be reheard en banc on the issues presented in the brief as if no prior hearing was had. Because of the malpractice of the former attorneys appearing for petitioner-appellant this reconsideration is fair. --- Sparks v. Duval County Ranch co.Inc. CA TEX 1979 604 f2d 976 aff'd more cite in ref.

If the lower court judge was unhappy with Dr. Tewles she could have relied on Mr. Marron, an expert at assessing within the tax code whether the transactions were speculative or he was a dealer. She ignored his expert opinion on everything also. Mr. Marron testified Michelson was a dealer and the transactions were proper within the year taken. He testified he had a metal inventory of about $940,377 dollars, and kept it on a LIFO basis.(t-317,358) She can't brush him off as not being qualified to judge it within the tax code, or knowing the parameters of the business, or taking the time to investigate, or having a professional relationship for 20 years, as she does Dr. Teweles, in inserting her view for what was necessary for experts to have done. The record shows a conjured up mistrust of experts to suit the Judge's

subagenda. ALL the witnesses and documents which uncontrovertedly and conclusively show he was a metal dealer should control the fact result.

However the law must control whether it was a proper prerogative of Michelson to enter the metal business or if IRS can deny petitioner that right, as herein is being done. The evidence necessary to show that he did sufficient to be engaged in that business must be weighed as the right of a farmer or merchant would be. It has been addressed in ---Faulconer v. CIR 748 f2d 890,895 4th cir (1984)Nickerson v CIR 700 f2d 402 in a circumstance where there are implied ulterior motives. What they are here I don't know. In Nickerson and Faulconer, and other cases under sec 162, which is applicable here, uniform standard are used in assessing if it were a trade or

business. Under those criteria it would be overwhelmingly seen as a trade or business. For brevities sake we do not extend the brief with further analysis, but refer the court to the criteria list in the cite, and the record. Judge Parker should have used recognized criteria rather than off the wall generalizations like he had no customers. Since the issue was not properly cast in terms of if specific transactions were speculative, it must fail.

Weiler v CIR, 187 f2d 744 other authority under Corn Products Refining Co.v Cir (1955),350 US 46, 76 s ct 20, 110 led 29 was relied upon because of its special application to the parallel situation and issue wherein one is damaged in a disrupted market, if those losses would be ordinary to that years business. They would. The trial court

ignored proper authority and this court must reverse.

Michelson did all he could to save himself from the manipulation, consistent with honoring his obligation to deliver metal under the contract. Clearly this Court misapprehended the situation and was led to believe that the losses arose other than from a manipulated market, as expert testimony said, and Judicial notice concluded. Evidence shows that they cannot have arisen from speculative investor undertaking as IRS 's attorney conjecture. Findings from attorney conjecture are clearly erroneous.(see lack of transcript reference in support)

Monfort from this circuit, correctly suggests deducting closed contracts not resulting in delivery, from costs of goods sold, as Michelson did herein. What authority does IRS rely on for

recatagorization of the LIFO inventory method, which they have admitted taxpayer used. NONE. It was their burden given contrary LIFO admissions in the answer to proceed. IRS in Monfort offered expert tax accounting testimony. Here they failed to rebut same. Again, as a matter of law, the IRS's notice recatagorizing Michelson adjustments to cost of goods sold treatment of the loss transactions must be clear and persuasively supported at trial. It was neither. It was not correct. Incorrectly the Judge picks up from attorney conjecture "Petitioner's short positions in silver could not guarantee him a minimum sales price since he had no silver to sell;.."pg 28 (567) This is not evidence that the transactions were not anticipatory hedges, nor is it supported in CEA or contract law. It will not overcome the

truth and expert reasoning on anticipatory hedging given by Dr. Teweles. Conjecture will not overcome testimony that it was hedging done according to the rules of the CEA, or trade practice which was judicially noticed. At pg 6 (545) she cannot ignore established trade practice and regulation that is persuasive on the issue and would be in conformity of treatment of taxpayer under the law, saying " it is not determinative of the tax issues before this court." She must look to evidence deemed reliable by case law, by the expert,--- In re Japanese Electronic pdt Lit 723 f2d 238, 3rd cir 1983 (rev on other grds.) and which would result in fair treatment of the taxpayer before the different parts of government. Because it is such a specialized area she should have heeded Dr. Teweles unbiased

opinion.(---see Shad v Dean Witter Reynolds 799 f2d 525, 530, 9th(1986)- see point 10-) She did none of these. She must as the trier of fact look to the evidence of record and the implication of conclusiveness see therein. Since the scheme argument was unclear and was unsupported at trial by evidence it must fail first by the legal error in proper application of the law and only incidentally as a matter of evidence. No expert would testify that there were no other dealers using anticipatory hedges in silver to set a price for silver. Also only part of the transactions disallowed were claimed to be anticipatory hedges by Michelson. He showed that those in gold were hedged versus inventory. We think this court misapprehended that situation seeing the transactions as all in

silver, and were speculative, and caused as part of a "tax avoidance" scheme.

Judge Parker's sweeping Michelson's profit and loss statement, general, and subsidiary ledgers, and other business documents under the rug in her footnotes pg8 (558) can not be the treatment it deserves in a court of law. The presumption that the taxpayer has acted correctly in maintaining proper books and records, was improperly ignored. She ignored IRS admissions in the answer--- Auto Owners Ins co v (see -Point 7- below) and Marron, a Harvard tax lawyer and CPA testifying as an tax law expert and accounting expert said that petitioner's books and records included a proper profit and loss statement, inventory records, etc, and were more than adequate ledgers for a small business. He testified how the treatment

as an adjustment to costs of goods sold was the best method, even in these unusual circumstances. This is more persuasive than the treatment found unsupported in Judge Parker's footnote pg 19 (558). It was proven to be according to general accounting principles consistently applied not "as a matter of mechanics". That coupled with petitioner's own testimony is more evidence than needed to shift the issue of recatagorization to the governments burden. What testimony supports IRS? Do they contend that the books and records were improper? Just saying petitioner prepared the profit and loss statement and kept the books and records which the CPA used in preparing the tax return, does not make them wrong. Every small business does it in that fashion. The burden was upon IRS to show that the

inventory record was incorrect and they did not meet it. They should lose the issue therefore,---see Baltimore Dairylunch ,inc vs US 8th cir, 231 f2d 870, because the burden had shifted upon a proper consideration of the evidence taken as whole. The Judge addressed this procedure in Monfort and Judge Parker was required to address it similarly.

Using the document LIFO Inventory ledger to determine that some of the inventory was "held that metal for rather long period of time, two years or more," pg25 (564).This does not transform it from metal in inventory to capital assets. It clearly fits all three parts of the literal words of the code exception. It was (1)stock in trade, (2) of a kind which would properly be in an inventory and (3) for sale to customers in the ordinary course. If finding two

year old inventory in a LIFO inventory record transforms it to capital assets, any LIFO inventory record in the metal business would show that the oldest inventory was older than two years. Congress recognized and nurtured an exchange market for the expressed purpose of facilitating commerce by providing a niche for those taking mine and refinery output and holding it for some time to allow demand to catch up and mines and refineries to operate at level capacity, and so producers had immediate customers. She ignores this from the record (t-367) . And if showing that two year old inventory becomes a capital asset in the hands of the taxpayer, they were required to show it through an expert witness, not from the faithful bias of the JUDGE working for them.--- Davis & Cox v Summa

corp 751 f2d 1507, 1511, 9th (1985) This was not harmless error.

Starting in 1981, till 1986, the law around commodity exchange contracts was in a state of change. The agents and the lawyers for the IRS have herein consistently misapplied these changes to the appellant's 1979 tax return. The court must look at the word of the law for the year in which the return is filed. It must conform to that law alone.

-Point 2-

Does deletion of certain transactions of the same nature as other transactions, impermissiblely infringe the Supreme Court doctrine, prohibiting the splitting up of taxpayers transactions to increase or find a tax? -- --Gregory v Helvering 1935 , 293 US 465 , 55 s ct. 2??, 6 led 596.

It is unquestionable that the IRS in its NOTICE takes certain transactions in 1979 and disallows them in that year but then turns around and allows them in 1980. (notice pg 6 &7.) It is unquestionable that those removed were done in the ordinary course and not materially different from those it did not remove. Removing $304,895 in hedging losses from the taxpayers business for the year in which they occurred is wrong under the above doctrine. It only purpose is to increase the 1979 income and find more tax.

What is shown on the ex." 1", reproduced from pg14(553), for the straddle discussion following and here <u>DOES NOT SHOW</u> all the other transactions in petitioners business. Omitting the $460,050 referenced in the footnote on pg19(558) or $788,304 in 1980

transactions or business of petitioner, or over 58 other transactions and then on pg7 (542) finding that the" 1,000 pages of transcript is singularly devoid of any information as to petitioner's alleged transactions in metal, other than the few transactions on the commodity exchange that resulted in the large losses claimed on his 1979 and 1980 tax return, which are the subject of this lawsuit", is totally incorrect and inconsistent and misleading. We think the reviewing court may be mislead or misapprehended the situation.

The $ 1,303,405 taken away from 1980 was no different from the $788,304 in sales of metal in the business. Proper accounting treatment placed it there as consistent with prior years, the case law, trade practice, accounting practice and a since of fairness in the situation.

Date of Contract	Price Per Troy Oz.	(Proceeds to be received for delivering 5,000 oz.)	Date Closed Out (by offset)	Price Per Troy Oz. to Close Out	Amount to Close Out Position (Price x 5,000 Oz.)	Loss on Transaction*
11-16-78	$ 6.9200	$ 34,600	12-28-79	$29.7220	$148,610	($114,010)
11-17-78	6.9900	34,950	12-31-79	30.8420	154,210	(119,260)
11-17-78	6.9900	34,950	01-10-80	36.8000	184,000	(149,050)
11-30-78	6.1300	30,650	04-16-79	7.2900	36,450	(5,800)
11-30-78	6.1500	30,750	05-25-79	8.8350	44,175	(13,425)
01-22-79	7.4300	37,150	01-10-80	37.2500	186,250	(149,100)
01-25-79	7.6800	38,400	01-02-80	32.9940	164,970	(126,570)
02-07-79	8.6480	43,240	01-03-80	35.1740	175,870	(132,630)
05-01-79	9.7000	48,500	01-10-80	39.5000	197,500	(149,000)
08-08-79	11.1500	55,750	01-10-80	40.7690	203,845	(148,095)
08-31-79	10.4950	52,475	12-04-79	19.5500	97,750	(45,275)
11-27-79	21.6000	108,000	01-10-80	41.1650	205,825	(97,825)**
12-10-79	23.4500	117,250	01-10-80	40.3720	201,860	(84,610)
12-31-79	32.3720	161,860	01-10-80	38.2000	191,000	(29,140)
12-31-79	31.1720	155,860	01-10-80	38.2000	191,000	(35,140)
01-02-80	33.9740	169,870	01-10-80	38.6500	193,250	(23,380)
01-03-80	34.0940	170,470	01-10-80	37.7500	188,750	(18,280)

*Petitioner on his tax returns computed the losses resulting from the contracts closed in 1979 exclusive of broker's commissions and fees, but computed the losses resulting from the contracts closed in 1980 inclusive of those commissions and fees. For consistency, the Court has listed all of them exclusive of those expense items.

**Petitioner failed to claim this loss on his 1980 tax return, but if petitioner otherwise prevails, respondent agrees that loss should be allowed.

EX X-1

It was admittedly oversized for hedging adjustment in relation to sales. However that was not of the taxpayers doing, but of the actions of bad business practice in the market- monopolization. Dealers in that market lost millions, many were crippled, etc. All took similar transactions in the ordinary course of their business. All were oversized. The suggestion that it was loss under section 165 as a casualty loss is out of place. Other people filed suits. None of them were shifted about as here, disallowing those transactions in their business because of recovery. It is recatagorization , without reason, reality or case law providing some logic to be more persuasive than petitioners case law (Weiler), expert testimony (were correct), Congressional report, (judicial notice) and presumptions(

ordinary course). It is merely an impermissible way to increase petitioner income proscribed by the above doctrine.

Evaluated in the context of the doctrine on splitting up the transaction of a business, the Court must disallow the splitting and therefore accept the returns as filed.

-Point 3-

The following all was raised in the trial briefing and was malpractice for prior counsel not to raise it on appeal for review. Because it is an overruling decision of exceptional importance it deserves en banc review, de novo. And because it even controls if this Court assumes the investor theory, it deserves proper consideration. --

The plain words of the statute convey Congressional intent of the tax

law for the year in which the return is filed, (1979). AND IT WAS NOT FOLLOWED; rather there is clear evidence it was ignored.

Reference the center column, schedule "1", next page, reproduced from pg14(553)., It is used for discussion here and elsewhere. Five listed transactions are closed in 1979, replaced with five new ones closed in 1980. <u>These are straddles.</u> Take special note that three were <u>done in December 1979</u> for comparison to **Miller, Gilbert** below.

Congress in sec. 108 of the Tax Reform act of 1984 when it addressed this particular area of the law in regards to commodity futures contracts specifically worded the statute so that it was clear to those transactions prior to 1982. That

concerns us here. The tax court must follow the literal word of the statute.

(a)General Rule--For purpose of the Internal Code of 1954, in the case of any disposition of one or more positions -- (1) which were entered into before 1982 and form part of a straddle, and (2.) to which the amendments made by title V of the Economic Recovery Tax Act of 1981 do not apply, any loss from the disposition shall be allowed for the taxable year of the disposition if such position is part of a transaction entered into for profit. (b) Presumption that transaction entered into for profit--For purposes of subsection (a) any position held by a commodities dealer or any person regularly engaged in investing in regulated futures contracts shall be rebuttably presumed to be part of a transaction entered into for profit. (Tax Reform Act of 1984, publ l 98-369, sec 108, 98 stat 630).

Treatment of commodity exchange contract losses "before 1982" were continuing to be allowed "for the taxable year of the disposition". That is the plain language of the statute and what taxpayer can expect to happen. Judge Parker was aware of the binding precedent set by the Court en banc

hearing in --- Miller, Gilbert v CIR 1985, 84 TC 55 and inarguably of the effect herein. Much of her trial error and effort was to obscure the precedent, and affect. This court must reverse it.-- CIR v Textile Mill, supra. Michelson was one of those dealers she felt should not be allowed the treatment the law affords. She moves forward on her own and IRS's sub agenda. (What'll we do now, after Miller, Gilbert?)

Congress was clearly aware that there had been some abuses in the use of "silver tax straddles" in years prior to 1982 and addressed them knowing that the IRS cases then before the Tax Court would be effected if the CONGRESS chose to so effect them. It did.(see p842 Miller, Gilbert supra)

This is important to this case because it was started off from the

dragnet operations of the IRS against anyone who dealt in the silver market. Error was made in the trial (t-1003,04,15) when the court would not allow proper cross examination of the IRS agent who made the investigation and prepared the notice, so that this would be clear in the appeal record.--- US v Williams CA tex 1971, 447 f2d 1285 more cite in front) {appellant contends that some cross or examination was required to be allowed and this case law should apply here,although usually reserved to criminal proceedings. } Judge Parker virtually ignored the right to cross or examine, IRS agent and Appeals Officer, witnesses subpoenaed on this point, the notice, the preparation, or anything. Also raised in briefing was the point that the agent did not identify and offer into evidence the Notice, he prepared.

A error was made in the disallowance into evidence at trial of a "switching schedule" (x-2) which showed how the transactions at the end of 1979 were switched into 1980. While this would be a harmless error, since other ways were available and used to address it, it is mentioned because it is especially showing of what was up her sleeve. Me' think' she protest too much. Straddles are usually referred to as a switch for a dealer in metals. The court was required to allow that compilation since the basic documents were admitted. What went on is clearer from a compilation as seen in the switching schedule disallowed. Why was Judge Parker so adamant that the switching schedule not be allowed at all? These were the transactions she said were at issue and arranging them showing how all the

EX X-2

SWITCHING SCHEDULE

ITEM #	DATE	DELIVERY SWITCH	CONTRACT MONTH	$PER OZ.	P&S DATE	PR
1.	11/16/78	TO #13.	DEC 80	6.92	12/28/79	29.72
2.	11/17/78	TO#15	DEC 80	6.99	12/31/79	30.84
2.	11/17/78		DEC 80	6.99		
3.	11/30/78	TO#8.	MAY 79	6.15	5/25/79	8.83
4.	11/30/78	TO #9.	APR 79	6.13	4/16/79	7.29
5.	01/22/79		FEB 81	7.43		
6.	01/25/79	TO #17	APR 81	7.68	1/2/80	32.99
7.	02/07/79	TO#16	AUG 81	8.64	1/3/80	35.17
8.	05/01/79	PREV 3	DEC 81	9.70		
9.	08/06/79	PREV 4	JUN 82	11.15		
10.	08/31/79	T #12	DEC 79	10.49	12/04/79	19.55
11.	11/27/79		AUG 82	21.60		
12.	12/10/79	PREV10	APR 82	23.45		
13.	12/31/79	PREV1	JUN 81	31.17		
14.	12/31/79	PREV 2	JUN 81	32.37	CANCEL	
15.	12/31/79	PREV14	JUN 81	32.37		
16.	01/02/80	PREV 7	AUG 81	33.97		
17.	01/03/80	PREV6	APR 81	34.09		

dealers were meeting the problems of no silver in December is proper. Why were they disallowed? (t-667-9,978) These abuses were intended to obscure from this Court the lack of foundation behind the IRS case and its lack of evidence, as well as to obscure it from case law precedent, or alternative pleading.

Not allowing cross examination here is error of such a magnitude that it can be seen to taint the trial.--- Delaware v. Van Arsdale 475 US 673, 106 s ct. 1431, 89 led 2d 674 (1986) Proper inferences were not allowed to be draw in the case, nor was it properly allowed to show bias in constructing the erroneous notice. Instead there is practiced deceit by the judge about the notice and its admission into evidence , and weight and presumption of it (t-3,25,1002 ,1004)) and her disallowing of evidence bearing

on it and issues within incorrectly treated.

There was specific consideration given in **Miller, Gilbert** for cases who had been NOTICED on 1979 tax year issues. Congress was aware and chose its method of rectifying it. Congress acted and the en banc Tax Court hearing in **Miller, Gilbert**, supra adhered to it.

(p846 of **Miller , Gilbert**) "Applying section 108 to this record we conclude that the losses realized on December 3 and 4, 1979, in which the December 1980 short gold position was disposed of are all allowable...(and continues further down that page.)...On these fact we are constrained by section 108 to find for petitioner notwithstanding the fact that this result is directly contrary to our holding in **Smith and Fox** . It is not, however, for this Court to question the wisdom of the congressional mandate....and concurring on p850...If the practical effect in honoring the clearly expressed will of Congress is to grant amnesty to pre 1981 commodity tax straddlers, so be it. It is certainly not the proper function of this or any other Court to subvert the will of Congress by substituting the personal preferences of the Judges, and the majority prudently has not done so. "

IRS has continued acting herein against the mandate of CONGRESS. IRS upsurps Congress in its actions herein and certainly the JUDGE abuses her discretion in aiding it through erroneous ruling, and bypassing her own Court precedent. None of these actions can be allowed by this Court.see American Menthyl Corp v EPA 749 f2d 826, 242 US app DC 148, appeal after remand;(at p833 on an agencies interpretations after Congress addressed the issue.)

Congress intended in 1982, to effect those cases which IRS had--acted wrongly on--and put the issue to rest. Taxpayers would no longer be pursued by the IRS disallowing commodity exchange contract losses in silver for 1979 and any year prior to 1982. It applying it,it would make no difference to say that this is applicable to silver straddles only,

because it is the application of commodity exchange contract losses fully against ordinary income, in the year of disposition per the logic on p843 of the en banc decision and the fact that those transaction were in gold would not matter. <u>This action of CONGRESS was decisive on all issue then at issue in the case.</u>

Judge Parker of the tax court was incensed at the free ride given the commodity dealers, ignored Congress and the tax court precedent. Both are error reversible by this court. She was part of a strongly worded dissent. She felt that:

> ..."The real significance of the issue to be decided by the court today can be illustrated by figures contained in the congressional debate; reportedly , notices of deficiency have been issued in 15,000 cases involving tax straddles and deficiencies of $1.5 billion. 11 Cong Rec. s 8390 (daily ed June 27,1984) and 12 Cong. Rec. E3251-E3252 (daily ed July 24, 1984) By the enactment of section 108 of the Tax Reform act of 1984, Congress

has clearly indicated that tax relief is to be extended to dealer in tax straddles at a cost of over $300 million in revenue." pg850 Miller,Gilbert.

IRS continued the abuse of taxpayer Michelson, herein and possibly others. Michelson was one of those 15,000 dragnetted into court. He was the hapless victim of a corner disrupting his business. And now is ensnarled in-between IRS and Congress and the Tax Court desperately trying to get out. Herein the abuse is seen in the record wherein Judge Parker ignored pretrial motions which would have led to summary judgment. That was a hidden abuse not of commission but of omission.

Under either theory of dealer or investor for the year 1979 and 1980 and 1981 the court must rule that the losses which IRS has rescheduled were correctly deducted in the year of disposition.

If she had allowed pursuant to rule, proceedings on taking judicial notice of the federal US District Court opinion, and if needed other proceedings (see **Weinstein's Evidence 201 (03)** at pg 201-44) there would have been no subsequent errors permeating the record and trial following. This was not only abuse of discretion but outright flaunting the "mandatory" word of the statue and pleading.(t-89) Summary Judgment for Petitioner would have removed the cases from tax court docket and no trial been necessary. She committed a second error of a law and fact nature in not letting facts conclusively decided in another case, decide her case. Judge Bratton's opinion was deservedly of such weight and so closely related to the transactions, that she judged it correctly to be conclusive but incorrectly omitted it.

Tax treatment in harmony with this judgment and opinion would have been the ideal resolution, combined with what had transpired under Miller, Gilbert and Congress' investigation of the corner. -- - Grason Elec. V. Sacramento Muni Utility Dist. 571 f supp 1504 It would protect the government as under tax laws, the government would collect tax on the recovery when is was proven, that there was a corner. She was required to use the evidence persuasive on the issue and to apply those common facts to the law, to resolve the case. Error in NOT RULING on the mandatory request for judicial notice was made and prejudiced the rights of petitioner in handling the case. Going forward from there, is a record permeated with error and abuse. She further misused procedure in not determining that there in fact were no issue to go to

trial on that had not been decisively determined as a matter of law by the Miller, Gilbert v CIR, supra, ruling of the en banc tax court applying the wording of the written statute. She continued to error in disallowing petitioner rulings on his motions properly submitted which went to the experts IRS consulted , and admissions and other pre-trial work. She allowed no attorney authority to properly process the suit. Instead she is seen (t-26,27) dumping many motions on petitioner as trial started, which never appear in the record.That is covering up the abuse. Other Judges moved on in concert with the en banc ruling--- King v CIR cch commodity futures reporter, 23,392; tax court cch 43,520, 87 TC?? -and those who were dealers in the commodity market, and

had been dragnetted into court, were released.

She took the clear wording of the statute as regards dealers presumption and trashed it. Her opinion wrongly stated four years after trial was that buying and selling metal on the exchanges is insufficient in itself to qualify as a metal dealer. He must have "some separate trade or business apart from the commodity futures transactions themselves"(pg 29 (568). Such was not the law (CEA sec 2,3) or practice per Teweles, in 1979. It was not what Congress intended in its statement to presume dealers. It was not what chairman Rostenkowski as reflective of Congress intended. The usual merchandising function seen of dealers on a board or trade is "risking capital" in "carrying an inventory" which "they sell" from.

This merchandising function Congress has so defined in the CEA which she judicially noticed.

And one does not have to go looking about for customers as implied. Any farmer or merchant, can go to the auction market and instantly sell their commodity, or buy more for delivery with theirs to someone on that exchange or elsewhere. All dealers are not huge multi-national integrated operations. That is one of the main features of a central auction market in our economy. To hold as she has that he had no customers pg 31 (570) is clearly erroneous. It cannot be reconciled with the law or fact. The contract is not the same as securities. One undertakes to deliver metal to a customer. Michelson maintained an office in a commercial building, and delivered metal under the

contract from commercial warehouses where he stored his inventory. That is the trade practice required of dealers despite opinion on pg26. (565).

This court must order as a matter of law, the record conformed to the proper precedent, Miller , Gilbert, v CIR, and order in favor of petitioner as the proper remedy. The Court of Appeals ruling herein will overrule the TAX Court en banc ruling, Miller, Gilbert v CIR, supra , as applied to the year 1979, and therefore should be done with only the utmost certitude and in circumstances that clearly reflect that and the intent of CONGRESS. It is a central reason why we request an en banc hearing. We are convinced it should not be allowed to override Miller, Gilbert v Cir.

-point 4

Congress was clearly aware that there were peculiar problems in the silver market from the corner in the market, by its own investigation, CEA sec 21, as well as in the treatment of the "silver tax straddles" issues. Congress was aware and the trial court was made aware, of the thousands of legitimate business who dealt in silver or silver futures contracts who were injured by what was a corner. Congress clearly knew and intended those businesses to take those losses in the ordinary course of their business "in the year of disposition" (see above statute). And when any judgments were forthcoming because of anti-trust violations, take the recovery in as ordinary income. Michelson took advantage of these proceedings in filing his suit in July 1983. The lower Court improperly ignored

Congress' intent despite taking Judicial notice of it as expressed in Rep. Rosenthal's Congressional report on the corner, and having been a participating Judge in the **Miller, Gilbert** v Cir case. It is clear she is incorrect at pg18 (557) in her determinations that the 1982 judgment she should have judicially noticed, "was not an adjudication on the merits" as it is she is incorrect in her further treatment or use of it. It was error to have ignored the final judgment of a directly related matter in the US District Court. Judge Bratton was not sitting in a vacuum. He had considered the case two years, and at that point was aware of Congressional investigations and other suits and other claims. He also had ruled against joiner of conspirators in the corner. He ruled against fraud, fiduciary duty and several other contract

claims, awarded judgment on the debit in the account, and dismissed the rest. One must conclude that all the transactions were closed, and that would have gutted the issue as noticed. It went on appeal because the conspirator's would not be joined in the suit, and was ruled final. A suit was started in July 1983, and that was what was going on in 1986, and eventually dismissed.

Those who had been cheated by the corner and who might file suit from the Congressional investigations to recover their losses were not in 1979 subject to the consideration of whether or not they might recover. Recovery was almost exclusively taxed when it was received. It wouldn't interfere with claiming damages in a law suit. Excluding damages from the year in which they occur, because a lawsuit is filed for their

recovery of a different nature is wrong on the part of IRS. That concept was not in 1979 developed in case law or properly applicable to the transaction taken in the ordinary course of the business. Sufficient evidence of consideration of recovery and treatment of recovery in 1979 is in the record to sustain petitioners burden, contrary to the statement it was not.

Because no lawsuit existed of any kind in 1979 to recover from, it was error to conclude same. Because petitioner was sued in 1980, the initiative of recovery was not his choice. And because all parts of the case were finally adjudicated either by ruling or dismissal, no recovery was made or existed from that suit. Instead of conforming results seen in that result through judicial notice, and in fairness

of treatment to petitioner, rulings opposite are seen. All these excuses for disallowance of damages comes years after and could not have been a basis for consideration at the time of filing the return.

As Judge Parker sees it, Minpeco, in a rather famous case Minpeco v Hunt, et al. could be recatagorized in 1983 for 1980, as not having had the 500 million dollars in silver futures transpiring that year, because in 1986 IRS found that in 1980, Minpeco had filed a suit and had a prospect of recovery in anti-trust damages. This would increase Minpeco's income 500 million dollars, in 1980, and their taxes 250 million, and then 250 million or more in interest and penalties. The government can grab the whole 500 million recovery claimed, whether or not Minpeco was

successful, instead of properly taxing it in the year of recovery. That is not the proper application of section 165 purpose, and it interferes with the process of law. Also, it shows room for blatant abuse of one taxpayer which IRS chooses to single out for 165 treatment, while the others are treated by taxation in the year of recovery. What about disallowing those transactions taken in hedging which were closed at a loss by, Moccata Metals, Englehard Industries, and others. The latter as a broad matter of law is of concern to this court.

Also, at one point in trial she accused petitioner of trying the corner case here, and in her opinion writes at pg 11 (550) "Petitioner devoted much of the trial time to the details of this attempt." Contrast this with what she writes 21 pages later. "Petitioner has

failed to sustain that burden. The record contains little information about the litigation between Merrill Lynch and petitioner." pg 32 (571) Clearly she writes words that suit the situation not what is in the record. The holding is clearly erroneous. She was given evidence sufficient to the fair treatment of the issue; that anti-trust lawyers knew that damages from the 1983 suit, would be from the predation of the corner damaging the business and from the artificial price. In computing damages this way you take the price paid for silver and deduct the "fair " price the court establishes, and the difference is the excess price paid. Damages are that price times the number of ounces purchased in the infected market. This would not relate at all to those transactions in gold disallowed in 1980

under the ruse of "recovery", or by traditional treatment relate to any silver ones. Also expert advise at the time of filing was that they were proper in the year of filing. (t-331)

IRS in remaking the recovery issue merely seeks to shift income, create a tax, and then try and collect interest on that amount. Since no prejudice will result to IRS because it collects on anti-trust recovery when received by taxpayer, and it seems obvious that for all of the dealers this court should see these transactions occurred in the ordinary course of selling silver, and are better treated that way. Taxpayer was aware that there was no certain immediate recovery as in insurance proceeds, so 165 was just misapplied or an erroneous view of the section, under the case law, existent in 1979.

The trial Judge errored in disallowing certain transactions taken in the ordinary course of business and because they do not relate to recovery sufficiently, exclusively or in such a manner as is readily ascertainable. pg 25 (544) It was evidential error to not use the judgment from 1982, for what use it was to the trier of facts.(the last use Michelson suggest it be admitted for (t-1030) (pg32 (571), and rule the treatment IRS suggested was misplaced.

Even the Congress was aware of how these losses were being treated by the taxpayers, and agreed. All dealers took them in the ordinary course, as Michelson did herein. About 1985 IRS was starting to complain about investor deductions of "other losses" from salary income, income from lawsuits, and incorporating that in NOTICES as disallowances of

losses from investing in one form versus gains in another type of investing, or as seen here. Thus,there is seen further conflict between what the law on the books was in 1979 and what is proper treatment of a small business damaged in an infected market, and what IRS wants to claim it noticed in 1984, or it tried in 1986.

We think this court misapprehended the standard for review of a "not having met the burden" where much is conclusive and mixed law and fact, and the law is misapplied. Reconsideration is proper.

-Point 5-

Judge Parker errored in not rendering a timely decision after the trial and briefs had been submitted. Several written requests starting a month after briefs were in, urged immediate ruling. This is a procedural error, which

coupled with the other procedural law violations manifest fundamental unfairness, and not due process. . The court should not allow the IRS to take part in this through collection of interest which will amount to over half of the monies being claimed by the government. This Court if it does not reverse, can correct the error by instructing the Tax Court in its computation that equitable considerations disallow any interest or penalty to be computed as being owed the IRS on any back taxes---

-Point 6-

Judge Parker errors in utilization of--- Arkansas Best v. CIR, (1988) 485 US 212 as underlying authority for the ruling she made. Judge Parker was required to rule by law of the case under Miller, Gilbert v CIR, Monfort and Corn

Products v CIR in application of the law to this case looking to tax law for the year 1979 and 1980 and 1981 .

It was error for Judge Parker to hiatus for four year and then misuse a Supreme Court case decided two years after trial and definitely not then applicable to the case because (1) it was not authority cited by respondent in brief or pre-trial and thus was not law of the case. (2) such an metal inventory case is not addressed within Arkansas Best. (3) the bright line of the cases is that the legal instruments in Arkansas Best are securities evidencing ownership of an enterprise, whereas in Michelson the legal instrument was a contract to sell metal for future delivery on a contract market.

Clearly the questions applicable to abuse of "capital gains law" seen in---

Corn Products, inc supra, would not have been seen by the Supreme Court at that time as having any concern because the distinctions had been done away with by Congress in 1986. That leaves it a narrow question of securities held by banks or other investors who claim various use of them in mergers.

Use of this case law retroactively is a misuse that must be corrected. Having no value because it is not on point it is mute on the question of vittating Corn Products. Arkansas Best is clearly not an overriding Supreme Court decision as misapplied to this case. Despite wording excluding inventory applications such as Michelson who had inventories in excess of a million dollars, Judge Parker muddies the water. As she has in her opinion, and IRS counsel has throughout, she side steps

the bright line seen in the cases over the years where the instrument being dealt with is "securities" governed under Securities law, and confuses it with those transactions as in Michelson, Corn Products, and Monfort where the transactions are in contracts for metal or corn or beef. The treatment is consistently different. This same mistake is seen in reliance upon Kemon v. CIR, 16 T.C. 1026 (1951) in her opinion and in trial brief. Clearly proven at trial is the fact Michelson used the contracts to take delivery or make delivery of metal, adding to or selling from his inventory of metal. No more is usually required to be shown.

It is error to ignore petitioner's testimony and documents which show that in all petitioners prior dealings on the exchange he bought metal or he sold

metal.(pg25 (564) And that in entering the contract selling gold for delivery in August 1980 he intended to deliver gold from his inventory which contained gold. And for the silver contracts he entered to deliver silver in 1981 and 82, he intended to deliver silver from inventory when the contracts were due. None of the contract delivery dates came about nor was delivery made because Merrill Lynch acted precipitously closing all his contracts and capturing his working capital which crippled his business. It is important to known that a corner is a predatory devise used or which results in harming other business, to understand the circumstance Michelson was in here. Merrill Lynch, the only contact with Michelson who could harm him in a corner, was held accountable. Merrill Lynch's version of the situation as "he was

committing "financial suicide" was proven wrong in a court of law. In MINPECO v Hunt, et al it was proven the cause was a corner, fraud and racketeering. Merrill Lynch said the same thing about their customer MINPECO, largest producer of silver in the world. Judgment is in this record. Absent Merrill Lynch's action harming Michelson there would have been no losses to his business, or Minpeco's. Absent special circumstances which IRS misapplies here, IRS would be requiring Michelson to file schedule c, and pay tax, and FICA and carry on his business.

It shows no consideration given at all to the corner in the silver market which in fact caused the losses to come about. Absent the corner Michelson would have delivered silver in fulfillment of the contracts in 1981 and 1982, as his plan called for. It is error to not see

it as a continuum of events rather than a fixed event and ignore the testimonial record in these matter which press firmly on the issues.

And the record shows that in the $460,050 from the sale of copper sold on the exchange in early 1979, in some 40 transactions, he delivered metal from his inventory, to fulfill the contract. This is the series of events which triggered the filing of a schedule C. And it happened early in 1979,long before any losses (see CPA affidavit on rule motion to reconsider). Judge's error on this is seen on pg 19 (558) where in a concert to make it appear that Michelson was motivated by consideration of the losses to file schedule c, she states, "After the losses in the commodity futures transactions sustained in 1979 and 1980, petitioner for the first time filed

schedule c's with his tax returns." While there is arguable support it is misleadingly worded and incorrect as to the cause. If there had been no corner and no silver losses, Michelson would have been required to report on schedule c, the material income of almost half a million dollars from metal sales in March 1979. Treatment of his developing business on schedule c after sales started, had been discussed with his accountant in 1978, when certain transactions were started, and when he finalized the hedging agreement with his bank and Merrill Lynch, and when he took further inventory. As she states it, and because one is mislead to think there is no other business than the losses and no other transactions than those before the court, it is error. It is totally contradicted in the record.

And in all those 58 other prior contracts he took metal into his inventory. So the implication seen in page 27 (566) that he was a investor because "the transactions in commodity futures in 1979 and 1980 did not differ from petitioner's earlier commodity futures transactions" is in error. To imply that the purpose for those done earlier was investment is contradicted by the facts above and others.The proper implication drawn from the petitioner's expert accountants testimony, and his own testimony, and the document records is that those earlier transactions were purchases of metal for an inventory of his stock in trade, and the schedule c did not need to be filed until sales were made. The unsupported inference that they show investment is pure rubbish, made up. Even in Monfort IRS argues prior

dealings treated different. While 1992 years requirement on starting a business require more elaborate allocation of start up expense by tax law, that was not the case in 1979. What was necessary to start a sole proprietorship in 1979 was the procedures Michelson undertook. The Court is confused by misapplication of inference to regulation after the years, and hurdles made up after the fact.

She refers in the Michelson opinion to "securities"(pg 24 (563) showing a lack of soundness in her opinion since nothing in law or evidence at trial or in the record remotely supports that view. This court must correct clearly erroneous views which bear heavily on the case law and certainly to the functional use. The law clearly defines "securities" different from commodity futures contracts. If one thinks of stock, he

thinks of things that have intrinsic value and evidence ownership of an enterprize. One is at limited risk. One does not have to select and grade his metal, insure it, store it or deliver it. He does not have to know purity, form, and weight standards or other specifications showing known by Michelson herein. She is wrong to couple the words "securities" with the words "commodity futures contracts" pg 24(563)& pg31 (570) for her own purpose and the court can correct the error and implication to case law misdrawn. Finding Michelson used commodity futures contracts for future delivery of metal from his inventories is proper. Securities has no application. It is proper to consider the purpose the contracts were entered. It is what should weigh heavily. Judge Parker should not have ignored the testimony to that point

and should have admitted the contract---cf. Edwards v Cir 415 f2d 578,582 (1969) Two more errors. Investors have theories of investing not shown here to exist. Investors take seriously that stock represents ownership of the enterprize. They are buying an interest in a business, or evaluating its worth.

IRS's counsel in its brief relies on those cases wherein the legal instruments in questions are stocks (i.e. clearly securities) and the hedging purpose would not be applicable. People cannot hedge merchandise inventories with stocks. As such they do not bear on the case.

The proper review is one of law. Whether or not the Arkansas Best case was overriding Supreme Court doctrine? Un fortunately it was improperly presented, but on this law matter alone deserves en banc review.

-Point 7-

IRS effort to categorize Michelson as not in the business must fail because the IRS ADMITS in its answer Michelson was in business, kept proper records through a CPA, and had a LIFO inventory and made elections proper thereto. Holding them to that admission is not unfair, as it is true and shown by the evidence.--- Auto Owners Ins. v 667 f2d 714 ,8th cir 1981 Not holding them to it ,is error and procedural unfairness exhibited by the trial court. While at briefing, they try to remove themselves from the admission saying business means anything, election of LIFO has a specific inventory meaning which this court should find they were required to know and in fact did know when they answered.

This was overlooked by prior counsel, and a proper subject for review, since it was briefed in the lower court.

-Point 8-

Ruling that "at risk questions" were not a part of the trial was improper. This testimony (t-314-317) is relevant and very useful to clearly distinguish the undertaking of Michelson from those which might be speculative. CEA contracts are instruments which call for delivery of metal, not securities which need no daily or weekly or monthly concern. Many courts have commented on the nature of the instrument and its unlimited risk provision, should the market move against a dealer. This is persuasive evidence that the dealings were not in stocks, or securities. Michelson's testimony shows he made contracts to make delivery of

Exhibit X-31

IN THE UNITED STATES DISTRICT COURT

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

FOR THE DISTRICT OF NEW MEXICO

AUG 12 1982

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, A Delaware corporation,

Plaintiff,

vs.

CIV NO. 80-0095 HB

DOUGLAS J. MICHELSON,

Defendant.

ENTERED ON DOCKET
AUG 12 1982

EXHIBIT #9

MEMORANDUM OPINION AND ORDER

This matter comes before the court on plaintiff's motion for summary judgment on the Second Amended Complaint and Amended Counterclaim. Having considered the arguments, evidence and exhibits submitted by the parties and the entire record, the court concludes that the motion should be granted in part and denied in part. Counts I through VIII and XIII through XV of the Amended Counterclaim will be dismissed. Material issues of fact remain as to the matters alleged in the Second Amended Complaint and Counts IX, X, XI, XII and XVI of the Amended Counterclaim, therefore, plaintiff's motion to that extent will be denied.

Plaintiff, Merrill Lynch, Pierce, Fenner & Smith, Inc., ("Merrill Lynch") brought this action to collect the deficit balance in defendant's non-discretionary commodities futures trading account which remained after the account was liquidated on January 10, 1980. Defendant Michelson is a dealer in precious metals. From October, 1978 to January 9, 1980 he traded on margin in gold and silver futures through an account at Merrill Lynch. His account was liquidated at the peak of an historic rise in silver prices after defendant allegedly failed to meet a margin call. Defendant counter-claimed alleging breach of contract, violation of several

Ex-311

provisions of the Commodities Exchange Act, 7 U.S.C. § 1, et seq. ("CEA"), negligent misrepresentation and fraud, and claims under the Sherman and Clayton Acts.

Counts II, IV, VI and XIV of the Counterclaim are founded upon certain alleged acts of negligence made by Merrill Lynch in servicing defendant's commodities account. Defendant asserts that these acts violated § 4(b) of the CEA. It is clearly the law of the Tenth Circuit, as well as other Circuits, that recovery under § 4(b) "must be based on fraud or willful conduct, and not mere negligence, mistake or inadvertence." Masters Commodities, Inc. v. Texas Cattle Management, 586 F.2d 1352, 1355 (10th Cir. 1978); Commodity Futures Trading Commission v. Savage, 611 F.2d 270 (9th Cir. 1979); Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977). Accordingly, Counts II, IV, VI and XIV will be dismissed.

In Count I defendant charges that Merrill Lynch intentionally failed to advise him that the risks involved in his dealings with it had changed because of its release to defendant of $575,000 worth of commercial commodity warehouse receipts. Defendant contends that this was a failure to fulfill a fiduciary duty, which operated as a fraud, violating both § 4(b) of the CEA and the rules and regulations of the Commodity Futures Trading Commission. Count V also charges Merrill Lynch with the breach of a fiduciary duty, i.e., the intentional failure to advise Michelson that the initial margin requirements on his contracts could be retroactively raised.

EXHIBIT

Merrill Lynch argues that Counts I and V must be dismissed because no fiduciary relationship existed between the parties, citing several cases to the effect that the fiduciary duties of a broker are limited to the faithful execution of the customer's orders. Shearson Hayden Stone, Inc. v. Leach, 583 F.2d 367 (7th Cir. 1978); Leib v. Merrill Lynch Pierce, Fenner & Smith, Inc., 461 F.Supp. 951 (E.D.Mich. 1978). Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,

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Ex-3iii

337 F.Supp. 107 (N.D.Ala. 1971). Although none of the cases cited by plaintiff considered whether a broker has duties like those relied on in Counts I and V, it is clear that Merrill Lynch has only limited fidicuary duties when dealing with a non-discretionary account. The court finds that they do not include duties which would support a judgment for the defendant on Counts I and V. As to Count V, the court also finds that defendant was advised that Merrill Lynch might raise margin requirements on his existing positions in ¶ 1 of the parties' Commodity Account Agreement which incorporated the rules and regulations of the Chicago Board of Trade. Rule 430 expressly authorizes brokers to set margins in excess of those required by the exchange.

Counts III, VII, and VIII involve Merrill Lynch's alleged failure to issue proper and accurate margin calls. Merrill Lynch has submitted evidence showing that the margin calls it issued to defendant were proper and accurate. Defendant having introduced no evidence to the contrary, summary judgment is appropriate on these counts. (While the testimony of one of plaintiff's employees seems to support defendant's claims of inaccurate calls, this apparent contradiction was later explained by plaimtiff. Defendant has not refuted or questioned plaintiff's explanation.)

In Counts XIII, XIV and XV defendant charges that Merrill Lynch failed to give effect to a three party agreement between Merrill Lynch, Michelson and the First National Bank of Albuquerque ("the Bank"), entitled "Security Agreement--Assignment of Hedging Account." Paragraph 3 of the agreement authorizes Merrill Lynch to call upon the Bank to advance amounts to meet margin calls on Michelson's account. It is undisputed that plaintiff's Corporate Credit Department in New York was unaware of this agreement. That same Paragraph 3, however, also provides that, "Nothing contained herein shall be construed to prevent or in any way limit the rights of the Broker to liquidate the account whenever, in the Broker's

Ex 3 N

discretion, the Broker deems it necessary to protect its interests." Thus, plaintiff was not in any way obligated to resort to the Bank. Furthermore, Merrill Lynch has introduced unrefuted evidence that both the Bank and the Albuquerque Merrill Lynch office which executed the agreement intended it to operate only as an interim measure until the Bank had physical possession of the warehouse receipts which the agreement secured. Summary judgment, therefore, will be granted as to these Counts.

Summary judgment on the Second Amended Complaint and Counts IX, X, XI, XII, and XVI of the Amended Counterclaim will be denied. The present deadlines for discovery and filing of pre-trial motions having been rendered obsolete by this decision, the case will be referred to the Magistrate for ruling on pending discovery motions and setting of new deadlines. In addition, the court has considered all pending motions for reconsideration of the Magistrate's decisions and, with the exception of the motion dated July 27, 1981 which is referred to the Magistrate along with the other discovery motions, finds that they are without merit.

Now, Therefore, IT IS BY THE COURT ORDERED THAT Plaintiff's Motion for Summary Judgment dismissing Counts I, II, III, IV, V, VI, VII, VIII, XIII, XIV, and XV of the Amended Counterclaim is granted. Plaintiff's Motion for Summary Judgment on the Second Amended Complaint and Counts IX, X, XI, XII and XVI of the Amended Counterclaim is denied.

Motions for Reconsideration or Review of the Magistrate's Decisions dated February 20, 1981, July 23, 1981, August 5, 1981, and November 3, 1981, are denied.

EXHIBIT

Chief Judge

metal and his expert,and the law (CEA) and prior practice support that purpose.

Michelson was at unlimited risk being in that business. His bank held him to it. His bankers testimony was that he was fully "at risk" (t-435) i.e. the acknowledgment that a sole proprietor is liable to the full extent of his assets for contracts undertaken. And Merrill Lynch held him to it. Merrill Lynch sued and the court determined(see x-3) that he was responsible under the contract. It is as security for performance of a metal contract that they are able to keep the monies deposited, and for guaranteeing that , that Merrill Lynch is entitled to collect monies advanced. IRS did business also in accepting taxes collected by this business as an employer on its employees under the number they issued to a sole proprietor. Would IRS

hold him responsible as a sole proprietor for those taxes collected? You bet. That is not the same as securities. Ownership of securities is intended to limit liability and a person is "at risk" only for the purchase price of the securities. A investor in stocks is not generally responsible for a thing. It is not the tax courts prerogative to remake the instrument Michelson used in his business into a security. She must take the evidence as she finds it.

Injustice results from improper exclusion of contract evidence at trial and its proper interpretation. A proper review of that ruling is a matter of law. As such it is proper to review it under a plenary standard.

-Point 9-

Was the law misapplied in this case given petitioners appearance at trial,

witnesses and conclusive record offered but where the tax court for bias reasons disallows all offers of evidence and apparently rejects all testimony. Arguendo, Did Petitioner appear at trial? Suppose he had not. The Judgment in negative conclusions and contentions of burdens not being met, could have been written just as it was. That is often the course of things citing Welsh v Helving 211 Us 111, 115, 54 s.c.t.89, 78 led 2d 212 pg 32 (571) Here it is a wrong citation and misapplication of the law herein. A fair trial must provide evaluation on the evidence before it. It is clear in the record this case is not subject to the harsh treatment see or implied from some cases under Welsch v. Helving cited by IRS where no appearance is made, or the issue is sham transactions used to defeat taxes and no

evidence is offered, or narcotics people are assessed income, or protesters who won't file returns or pay taxes are noticed and they reply with constitutional and religious objections and are summarily adjudicated. That is not the case here. The lower court misapplied the law.

The burden of petitioner in cross examination to disprove a negative is very great; too great; so many courts do not expect much if anything in assessing burden, to what overcomes a negative proposition. They view it very lightly under the bursting bubble theory. Anything introduced is sufficient to burst the bubble and shift the burden to the other side to prove it. --- Weinstein's Evidence That is the only burden petition faced in countering the notice contention that he was not a

dealer, or not hedging, or not closed, or transactions not sustained, or not paid interest, ---see Schaffer v CIR 779 f2d 849 (2nd cir 1985) at p858 It is a matter of law in this circuit that the burden was shifted back on all issues to the IRS when evidence was introduced, and IRS then failed to contradict. In light of that and the record as a whole the court should have granted petitioner's contention as a directed verdict, as she should have granted summary judgment before trial. There is no negative evidence produced or it is deminimus. The inference from the notice hardly deserves treatment . If there is an inference from the Notice, brought about by someone with transactions in silver futures contracts during this time of dragnetting accussing them of not closed transaction, and by implication a tax avoidance sham, then

it must be weighed against the vast record contradicting showing Michelson's business. The Judge mistakenly and conviently misused the common fact that most returns contain a small amount of interest income, to blare it across the opinion from prior years. It does not speak to the source of income for the year before the court. Any one with interest income can be said to be an investor. The first is easily overcome by the record showing the transactions were on a regulated exchange and the fact Michelson was in the silver or metal business all his life, he was trained in that and had inventories and was carrying on a business plan. Certainly what he knew about the metal business, and other expert testimony about the cause and his business is persuasive where no sham transaction purpose evidence is adduced.

The second turns taking away his livelihood and lifelong vocation into a fine art Torquemado would have appreciated, because everyone with interest income is an investor. Speculative conclusion from non expert Merrill Lynch employee is inadmissible as a conclusion, unsupported in the record since he relied on a number shown to be opposite, and unpersuasive in view of the inference of bias from litigating posture made up after the fact, wherein it was shown Merrill Lynch gave identical speculative conclusions through the account executive against Minpeco the largest silver dealer in the world. They fogged up their records also, but given the hedging agreement , the anticipatory hedge positions structured for delivery out two years, and various brokers who treated them as hedging it was

unbelievable that they were speculating, as it must be herein, on similar evidence. Expert testimony was necessary to appear to rebut Michelson's tax law and accounting expert, and his economic and market expert.

It is unclear whether Judge Parker rules on all issues for failure to meet the burden or on some, but whichever, it is error and injustice on a large scale..

-Point 10-

Judge Parker ignores no experts for the government despite that being required to overcome the testimony of petitioners experts on matters in which they have been admitted and testified. Proper case law citation was not provided by former counsel and the court did not take it up, as it should have , and to do so on review is proper.

The first question reached was the treatment of the expert any different than not allowing expert testimony? We think the record shows not. She should have respected testimony of an expert on a matter of specialized knowledge, as a trier of fact might. ---Shad v. Dean Witter Reynolds 799 f2d 525, 530,9th cir (1986). also see FRE 702 and see Weinsteins Evidence 702 (02)(03). Either Marron or Dr. Teweles was persuasive.

This court should look to the pattern and trial in the MONFORT v Cir, supra case as it is law of the case and of the circuit. Miller, Gilbert had respondents experts to disprove petitioner's experts. Both show the wisdom of introducing contradicting expert testimony. In Monfort, the IRS produced expert testimony on tax law to support the scheme alleged. Petitioner

herein provided expert tax testimony, and IRS did not successfully rebut it. Petitioner economic expert on commodity exchange operations and practice as to hedging and other matters at issue testified Michelson was a dealer and that the investigation he had undertaken was thorough and sufficient to his judgment. IRS has no valid evidence to rebut the petitioners experts. Nor did they show that the experts did not review the record and what ever he determined necessary to make that judgment.

Implications from a hypothetical question, underpinning Judge Parkers view that Dr.Teweles would have changed his view, if Merrill Lynch did, are clearly erroneous, (pg27 (566) because Dr. Teweles also relied on EF Hutton in how they initially categorized Michelson's account. Also he relied on

the Merrill Lynch hedging agreement. It is just not persuasive by the documents that Merrill Lynch saying some hidden number is going to control the question of account status, especially when it was shown that the identical number at one point, the crucial point, was on the Michelson account, and they had changed it.

As an expert, Teweles, relied on his experience in doing what he determined necessary to make that judgment. Since whether he had done sufficient work to reach an opinion was ask and answered at trial, it is impossible to overcome it by words in the brief.--- In re Japanese Electronic litigation, supra. Proper rebuttal by an expert was need to tell what should have been done that was not done. (see affidavit of Dr. Teweles if you think he changed his opinion knowing

that Merrill Lynch changed theirs at trial, rule 155 affidavit) He was not shown anything that would make him change his view. Saying he did not know the facts is not so. Use of that ruse by the Judge to brush off the views of the expert was incorrect evidence consideration under FRE 702 and Weinstein on Evidence. This court must reverse.

IRS put in their brief a lot of baloney from comments made from the trial attorney, not testimony. Look at their cites in the finding of facts in the trial brief or here. Most all are "to the record" and she mistakenly accepted that. She used a lot of them in her opinion. It is unsupported wrong. The court of appeals must address the expert question herein. If the Judge can just ignore all of the evidence then there is not a fair trail.

-Point 11-

The Court of Appeals was misled to the circumstance of the testimony petitioner would not give.(t-967) FRE 408 prohibits the use of statements made in the negotiations, and anything at that meeting would be within this privilege. IRS attorneys are generally forbidden to testify at trial because it compromises their ethics. Thus no one at that meeting could have testified to the fact, Michelson said, "he was going to win". Michelson asserted the privilege that no words made in negotiation conference should be used at trial, and IRS attorneys agreed to it. Michelson even would not meet with an IRS agent present because right before trial he thought they might try and use it. He insisted it be tape recorded.--- re Evansville Television 286 d2d 65, 70 , 7th cir. and

reflects the kind of bad faith IRS can do. Also the court should avoid proceeding in a way that is the same as having your attorney testify against you.

What was said in a negotiation in 1986 had little bearing or value on the considerations proper to evaluating if recovery was an 1979 issue. They are not proper evidence of that when there is testimony in record of the specific details. There are a lot of things different. He certainly thought more of winning after Congress investigated than before. And he thought less of winning after the court awarded judgment to Merrill Lynch on their claims.

No litigant can be said to have stated something usable herein, such as,"he was going to win a suit" where it is so generic that if he stated much else one would say that he had wrongly filed

the suit. The case law suggesting things necessary for evaluating use of those losses was properly followed. And citations to case law authorities for that issue are improper or absent.

-Point 12-

Tax court ruling consolidating tax years 1979 with 1980 was prejudicial error because it resulted in a trial and rulings which are not based on the evidence, the situation and, most importantly, the law in force for the year in question. Tax court ruling consolidating 1980 with 1981 was error, for much the same reason. Consolidating years resulting in not being able to try the issues before the court for the year in question is a law error. Mnooskins Estate v CIR ca 8, 1950, 184f2d 89. Thus, a plenary standard of review more towards mixed questions of law and fact is

appropriate here.--- Kotteakos v. US 328 US 750 ,66 s ct. 1239,90 led 1557 (1946) Error in notice consolidation and in the motion consolidation was brought out in the lower court but not previously addressed here. Consolidating years is leading to IRS improperly tying other years not before the court and not under the same laws to the ruling herein resulting in a further inequitable situation. The case was not tried under the proper law applicable to the accounting period. That is a question of law.

At the outset it is impossible to tell what is being done in one year consistently with the law and circumstances for that year because the NOTICE was improperly prepared on several years which each year deserved its

separate notice, hearing and consideration.

Because of the above and clearly see in the record and ruling post trial on the rule 155 motion a fair trail was not had and this court must reverse. The court need only review the lower court error in improperly evaluating under motion 155. Because one still cannot determine what the return for 1979 should have looked like from IRS's submittal, and because it impliededly rejected rendering by tax experts KMPG Peat Marwick, out of hand, which is clear to every item as the return should have been prepared, under the courts theory, it is injustice.

Review cannot determine if pursuant to **Miller, Gilbert,** supra, the losses were allowed in the year of disposition. Even as an investor in 1979, the

petitioner is allowed to deduct capital losses from capital gains and any more from ordinary income as the law provided. The 155 rule computation SHOWS that is not the case and that you cannot determine with certitude from the IRS submittal how the return was in fact treated. It is incorrect and this court must remand for the Tax Court to order it corrected even under the affirmation mandate. Rather, it should recall that mandate and give a new trial.

-Point 13-

Judge Parker was biased.--- Ward v. Westland Plastics, inc 651 f2d 1266, 1271, 7th cir (1980) In her dissent in Miller, Gilbert v Cir, supra is seen a frustrated and reckless position, not reflective of the circumstance and what Congress intended. In the abuse seen in this record is an extension of those

frustrated thoughts. The opinion in this case is a tortured and deceptive and wrongminded writing.

One needs also to look to the fact of bias seen emanating from the fact that she was one of the few women making it through the ranks of the IRS. And that she served them so well there, that she became their advocate here. IRS counsel did not have to raise points, as she prosecuted for them. More wrong doing and failure to correct it, is seen in the court record in her clerks actions against and disrespect to the litigant. IRS kept people in the room after the witness rule was invoked. IRS conducted ex-parte communications with the Judge. That everything was stacked against petitioner was a feeling in that courtroom and a reality. Stationing armed Marshals in the court room was wrongly

used to intimidate petitioner at a stressful time. The litigant was mocked and the trial attorney scorned. IRS did not have to present experts to rebut petitioner's expert because it was a case not decided on the evidence adduced at trial but fixed by IRS before. Such arrogance was uncalled for. This was properly raised in the trial court, and was a proper subject for review.

She felt it necessary to uphold the misconstrued cases and procedural error from the female attorney for IRS because she might be viewed as her mentor, or role model. Favoritism is seen in her salvation of the female IRS attorney from a faux pax which clearly showed the IRS misissued the notice. She verbally beat up Mr. Michelson instead, and said it was all judicially noticed. (t-1037)the government did it right.

Lastly in the overall view of what IRS was doing in concert with the agreeable judge is a very real problem when the lawmaker Congress is ignored. She was not going to let this metal dealer get what Congress intended.

Appellant is aware that the appeals court does not want to hear screaming on the bias of the lower court Judge , yet one must honestly present those errors in this Court, and point out the reason for them. That makes the appeal procedure effective. That is all that is intended here. The judgments and ruling and treatment proceed from a definite bias, not from the cool reading of the evidence. Not from a proper application of the law. Not from a fair trial. Ordering a new trial and trial Judge is proper. ---?

-Point 14-

It is impermissible to allow IRS to determine the right of taxpayer to engage equally in the occupations of the community--- Traux v. Rarch 239 US 33, 36 s ct. 7, 60 led 131 (1915) It is impermissible to allow IRS to determine the right of taxpayer to be a dealer in metal .

It is uncontroverted that Michelson spent a normal working day at the occupation of a dealer in metal, had a college education fitting him for his profession and years of experience in metal buying and selling. It is improper to allow the IRS to come along after a number of years necessary to set up the occupation and through their ruling disallow his participation in that profession. see Faulkconer v Cir and other , supra. It has material and psychological effects that deserve

consideration. FICA, medicaid, insurance and other things turn on being a dealer in metals. It cannot wrongly and arbitrarily take them away as done herein.

Our economic system demands that there be free entry and exit to the market. IRS being able to determine arbitrarily if one can be in business at that level is an improper trade barrier in a free market system. The Judge finding that something else was necessary is opposite the conclusive evidence of record seen in the CEA, and of the expert. The job of middleman is always in flux. Some business are more integrated than others. And it certainly is opposite the best evidence in the testimony of Michelson. The opinion of p27 (566) that he "concoct(ed) a trade or business out of his commodity futures transaction" is

just vilification, in these circumstances. Did the Department of Labor concoct that standard industrial classification also?

Traux v Rarch, supra, is fundamental to the right to elect to be a merchant in metal. Metal merchants are common merchant occupations in every community, from dealers at the head of the middleman chain, to fabricators, to scrap metal dealers at the other end, they are a valid occupation. How they go about trying to earn a living is best left to them. Other tax authority used in the trial brief also support the position. IRS is removing Michelson right to be in a business just as certain as if a licening board removes his license. Mistreatment under the tax law is more certain.

-Point 15-

exhibit X-4

BUREAU OF LABOR STATISTICS
INDUSTRY VERIFICATION FORM
ALL INDUSTRY

U.S. DEPARTMENT OF LABOR

This information collected on this form by the Bureau of Labor Statistics and the State agencies cooperating in its statistical programs will be held in confidence and will be used for statistical purposes only.

This report is authorized by law 29 U.S.C.2. Your voluntary cooperation is needed to make the results of this survey comprehensive, accurate, and timely.

Form Approved
O.M.B. No. 1220-0032
Approval Expires 12/31/85

This report will be used to ensure the proper industrial classification of your regular QUARTERLY EMPLOYER'S TAX REPORT and should cover the entire activity of the same establishment for the most recent calendar year.

WHOLESALE MARKETING OF FERROUS & NON-FERROUS METAL SEMI-FINISHED PRODUCTS (BARS, INGOTS, SHEETS, WIRE, FORGINGS, NAILS, ETC.) WITH OR WITHOUT WARE-HOUSES (METALS SERVICE CENTERS).

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ACTUARIAL RESEARCH SECTION
P.O. BOX 1928
ALBUQUERQUE, NM 87103

TELEPHONE NO. (505) 841-8696

BLS 3023-01 (Rev. Sept. 1983)

A. Does the description to the left include the principal product, activity or service produced by the establishment(s) covered by the Unemployment Insurance number specified below?

1 ☒ Yes - Skip to question C. on the reverse of this page

2 ☐ No (or if unsure) - Continue with question B. on the reverse of this page

OFFICE USE ONLY

1972 SIC	Ownership	County Code	Aux.
5051	5	001	

Please complete this report for the establishment(s) covered by the Unemployment Insurance number below.

UNEMP. INS. # 06-8104-1

MICHELSON D J
MICHELSON METALS
1503 CENTRAL AVE NW
ALBUQUERQUE NM 87104

EXHIBIT
18.

(18)

Judge Parker ruled improperly that the US DEPARTMENT OF LABOR which categorized Michelson's business as one of a dealer in metal, was inadmissible.(x-4) This is one of the many rulings against all documentary evidence. It is proper for the appellate Court to review that ruling of the tax court because it may have misapprehended the situation seeing that the court order, showing Michelson was a metal dealer, was the only documentary evidence which the lower court did not allow, or which she ignored. It was not. And prior appellant counsel errored in not clarifying it for the court. We ask for a proper review of the record under the standard of review of inadmissible abuse and consideration for multiple or cumulative error.---see Graham v. Graham v Wyethe Labs, div of American Home Pdts

corp 906 f2d 1399, cert denied 11 s.ct 511, 112 led nd 523 where for numerous evidentiary errors a new trial is given.

It is not necessary to bring before the court the Secretary for the Department of Labor to show that his department categorized Michelson in Standard Industrial Classification 5051 , which is as a dealer in metals. That is the normal job of that department. It is competent evidence of that fact, and should be unquestioned that it is reliable. It is a business record. Another view of the conduct of petitioner's metal business from a source considered reliable. This evidence showing the niche of commerce which Michelson filled was wrongly not admitted and was very persuasive of the fact of being in that business.

Her ruling on inadmissibility of the document because it was from 1983, was wrong. The fact that the form presented at trial was from 1983, rather than the one they issued in 1979, should not be controlling, as he testified that one had been issued in 1979, and that it was the same business engaged in 1979. He offered to bring the other year. That should tie in sufficiently to the year before the court. Also, the fact that the IRS wants to tie 1983 to this result is indicative of the usefulness of the evidence in determining Michelson to be a dealer in metals, as well as shows no disadvantage to IRS. It should have been admissible for inference that in 1983 Michelson was a dealer in metals and it was likely he was in 1979, if he says he was, and because Department of Labor will not misclassify people or do that for

investors. Other evidence in the form of petitioner's testimony shows that Michelson undertook the responsibility of the business and filed the proper State and other license and tax procedures of a small business. Additionally his phone and yellow pages was to a metal dealer; his stationary and cards were of a metal dealer; his banker was a specialist in small business who entered a hedging agreement to finance his metal business; other businessmen viewed him by virtue of his education, experience and conversations as in the metal business. All of these testified in evidence from 1979 show him to be a dealer in metals. All his assets were committed to the business. This kind of evidence, in view of the Faulconer v IRS, supra, criteria is conclusive. Judge Parker ignored proper criteria under case law in

evaluating the issue. It is far more likely than not that Michelson was a metal dealer, given little to draw a negative inference on. Proper criteria under case law is a law question reviewable for more probable than not an error was made.

-Point16-

Judge Parker offered the excuse in her opinion to one of her wrongful document evidence ruling, that the US District Court opinion was only description. This is an improper evidence ruling under the trial citation. The evidence burden seen under the trial citation Lehrman v Gulf 464 f2d 26, cert denied 93 s ct 687, 409 us 1077, 341 led 2d 665 (see front for entire cite) , also see Paterson v. Gaines (1847) 47 us 550, 598 12 led 553. * is whether Michelson viewed within the community can

be seen to have been engaged in that business, and whether this piece of evidence would make it more probable or not. Since it is reliable evidence almost conclusive of the fact that Michelson is a dealer in metals, it was relevant. She admitted it was central to the issues she was going to resolve, but then said it was irrelevant, and therefore inadmissible. (t-89) This is arbitrary action if there ever was.

A year before trial petitioner submitted a mandatory motion to take judicial notice of the court Judgment and opinion wherein the Federal District Judge found "Michelson was dealer in precious metal." She refused to act under the mandatory (FRE 201 d) ruling having all the facts at hand. That was error. She would not act on trial date, under a relevant criteria. And later and

at the end of trial under any criteria.(t-1030) She would not correct it at briefing. This court should correct it in review. Judge Bratton in his judgment and opinion decided on the same issues, just as if he gave testimony in court. It is wrong to think that a judge must be brought before this court to make that relevant fact known. The court opinion offered is evidence of those facts reasonably within it. She was made aware of through Michelson's testimony, that the court had ruled Michelson a dealer and included it in the judgment as an answer to whether it was hedging or not. Only dealers hedge. She states further within her opinion that this was still an ongoing dispute with Merrill Lynch, pg 5 (544) which it was not in 1986. It was not just some idle description. And it was supported by many

of the documents presented here which were presented at the Federal Court proceeding, such as the hedging agreement. The Federal Judge had to address the entire issues behind the contract undertaking. He had to review what went behind the account agreement, the hedging agreement, and the undertaking. The Federal Judge should be accorded respect due him by IRS which is an Agency of the Government, and conform their findings on essentially the same transactions to his view.

It is evidence for several things and deserves more weight than her ruling disallowing the introduction allowed. Since it was ruled inadmissible the court must reverse. .

-Point 17-

Legal error in judgment and non application of the rules of evidence is

Ex X-5

4552-1765

EXHIBIT 5.

SECURITY AGREEMENT
ASSIGNMENT OF HEDGING ACCOUNT

WHEREAS, the undersigned, Douglas J. Michelson, hereinafter called the Debtor, whose address is 1005 Gold Ave., S.W. has a commodities account (No. _____) with the firm of Merrill Lynch, Pierce, Fenner & Smith Incorporated, brokers, and dealers in securities and commodities, hereinafter called the Broker, which account is serviced by Broker's branch office located at 225 Gold Ave., S.W.; and

WHEREAS, Debtor is now indebted to First National Bank in Albuquerque hereinafter called the Secured Party, located at 40 First Plaza, N.W., Albuquerque, New Mexico, and expects to incur additional indebtedness to the Secured Party for the purpose of financing commodities hedging transactions in _____ [redacted];

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

1. As additional security for the obligations of the Debtor to the Secured Party, and for the payment of all sums which the Secured Party has loaned, or may hereafter loan or advance to the Debtor, the Debtor hereby grants a security interest in and assigns and transfers to the Secured Party all funds which may hereafter accumulate or become withdrawable from or paid out of the account of the Debtor with the Broker, including any balances which may remain to the credit of said account upon the closing thereof; except, however, to the prior payment of all indebtedness of the Debtor to the Broker, as such may exist from time to time in any account of the Debtor with the Broker, including, but not exclusively, which may have been incurred in connection with Debtor's transactions with Broker, and further subject to the Broker's lien and the right of foreclosure thereof in connection with any indebtedness of Debtor to Broker (including, but not limited to, any right of the Broker to close out open positions of the Debtor without prior demand for additional margin and without giving notice).

2. The Secured Party is hereby authorized and fully empowered, without further authority from the Debtor, to request that the Broker remit to the Secured Party any funds that may be due to the Debtor; and the Broker is hereby authorized and directed to pay to the Secured Party such funds as the Secured Party shall request on demand of the Broker that may hereafter be withdrawable or payable out of said account of the Debtor with Broker, without the consent of, or notice to, the Debtor. No funds are to be withdrawn by the Debtor from the said account without the Secured Party's prior written approval.

3. If, at any time during the continuance of any commodities account or contract in Debtor's account, the Broker may require additional margin with respect to such account or contracts, the Secured Party will, promptly, but in no event more than two business days following the Day of Nonclearance, advance to said Broker on behalf of the Debtor such amounts as may be requested by the Broker or under appropriate liquidating orders, provided, however, that the Debtor shall at all times remain liable to the Secured Party for any amounts so advanced pursuant to the terms of any agreement entered into between the Secured Party and the Debtor in connection with the transactions covered by this Agreement and Assignment. Nothing contained herein shall be construed to prevent or in any way limit the rights of the Broker to liquidate the account whenever, in the Broker's discretion, the Broker deems it necessary to protect its interest.

4. The Debtor hereby covenants and appoints the Secured Party as true, lawful and approvable attorney to demand, receive and endorse payments and to give receipts, releases and acquittances for all moneys payable to the Debtor, and this may be done in the name of the Secured Party with the same force and effect as the Debtor could do but this Security Agreement not been made. Any and all moneys or payments which may be received by the Debtor, or which the Secured Party is entitled under and by reason of this Security Agreement, will be received by the Debtor as trustee for the Secured Party, and will be immediately delivered in kind to the Secured Party without commingling.

5. Nothing herein contained shall be construed so as to prevent the Debtor from receiving the credit, subject to the control of the Secured Party as it may appear, of the account with the Broker. Until the Secured Party shall in its discretion and thereon notice of such election in writing to the Broker, the Debtor may make such additional transactions in his said account with the Broker as the Broker shall be willing to accept for execution. In the event the Secured Party does make such election and does deliver such notice in writing to the Broker, the Debtor shall not thereafter execute any transactions in said account and the Broker shall not accept for execution any such transactions without the concurrence of the Secured Party, except transactions in liquidation of any then outstanding commodity or commodity future positions. Upon receipt by the Broker of notice of such election and if directed by the Secured Party, the Broker will, attempt to promptly cancel any open orders which had been entered by the Debtor but had not yet been executed at the time such confirmation is received. If the Broker is unable to cancel such orders before they are executed, the transactions will be considered valid and binding on the Debtor and the Secured Party.

6. Whenever the Secured Party deems it necessary for its protection, it shall be entitled, without the consent or concurrence of, or prior notice to, the Debtor, to direct the Broker to liquidate any or all then outstanding open positions in the Debtor's said commodity account and to direct the said Broker to pay to it, the Secured Party, the credit balance as shall exist in the said account after such liquidation and after the payment to the Broker of all indebtedness of the Debtor to the Broker.

7. Any sums paid by the Broker from the account of the Debtor to the Secured Party under this Agreement shall be paid for the account of the Debtor and applied by the Secured Party to the payment of any indebtedness, including principal and accrued interest, then owing by the Debtor to the Secured Party. The balance remaining after the payment of said indebtedness shall be paid by the Secured Party to the Debtor. The receipt or receipts of the Secured Party for such funds so paid to it by the Broker shall be to the Broker expense to the receipt of the Debtor as fully and to completely as if funds had been paid to the Debtor in person and receipted for by the Debtor.

8. The Secured Party is hereby authorized and empowered to receive from the Broker, and the Broker is authorized and directed to deliver to the Secured Party, for its information, copies of the following written communications of all contracts executed for the account of the Debtor, monthly statements and purchase and sale statements of the Debtor, margin calls sent to the Debtor, notices of liquidation sent to the Debtor and copies of any written communications pertaining to said account which may be sent to the Debtor from time to time.

9. As between the Debtor and the Secured Party, this instrument shall remain in full force and effect until cancelled in writing by the Secured Party, or by the Debtor when and if the Debtor no longer is indebted to the Secured Party. Any cancellation of this instrument shall be without effect as to the Broker until receipt by the Broker of written notice from the Secured Party covering the terms of the termination of said Agreement.

10. The Debtor hereby represents and warrants to the Secured Party that the account or accounts above assigned have not heretofore been assigned or assigned.

11. This Agreement shall be binding upon the Debtor and upon his executors, administrators or assigns and it shall be binding upon and inure to the benefit of any successors of the Secured Party and the Broker.

Dated this 23 day of February, 1978

Douglas J. Michelson	First National Bank in Albuquerque
Secured Party	Debtor
By _____	By _____
(Title)	Frank Sanchez, Assistant Vice President

ACKNOWLEDGEMENT

To (Secured Party—Name and Address)
First National Bank in Albuquerque
40 First Plaza, N.W.
Albuquerque, New Mexico

Merrill Lynch, Pierce, Fenner & Smith Incorporated whose branch office is located at 225 Gold Ave., S.W.
Albuquerque, New Mexico
hereby acknowledges receipt of a copy of the above mentioned Security Agreement and Assignment and agrees to abide by the terms and conditions thereof to the extent of an obligations as the Broker described therein. No previous assignment or claims against the above described account or accounts have been received by the undersigned.

Dated 2/24, 1978 By _____
(Officer—Title)

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seen wherein the document (x-5) Hedging Agreement and the purpose therein , is ignored as if it did not address the issue of the conduct of business between taxpayer and his broker and bank. It did.--- Southwest Grease and Oil co.v US 308 f supp 107 (1969), 117. One can only see the contract as being consistent with a dealer in metals, as that is who conducts hedging. It cannot be seen in any way as pertaining to securities, or investors.

Another point she ignores is the testimony of the expert that the method and practice of Michelson was right according to the rules and regulations of the Commodity Exchange Act which sets standard and purpose for hedging. She ignores trade usage and custom Wigmore #2440. pg 6 (545) that most dealers in that market hedge in the identical manner

and are consistently sellers. And ignores documentary proof that his named appeared on the list with other dealers.(t-202)

-Point 18-

Michelson chose on the 1979 tax return to list his occupation as a "dealer in metals". The Court of appeals has been wrongly referenced to previous years tax return (1978) to determine the occupation of Michelson. While this one statement made on a prior year return is evidence, we do not think it should be admissible as those returns being admitted into evidence was contested (t-59). And it is not of sufficient weight and is contradicted, so that it cannot serve as record enough to say that was what he was in 1979. Since it does not speak to the year the Court addresses, and something else does persuasively, this court cannot allow the lower court

to use it as evidence at all let alone sorely sufficient to support the finding that he was not a dealer in 1979. That would contence the ruling error of the lower court.

It would speak very weakly if at all to the year 1979, since petitioner can change his occupation statement at least yearly. And really he can change it anytime within that year. It would not speak to the year 1980, as the prior year to that the answer to the same question box is that the prior year was listed as " a dealer in metals". The same is true of the year 1981.

-Point 19-

Judge Parker improperly applies the parol rule of evidence (Wigmore on Evidence #2425) to language in the document Hedging Agreement (x-5) which details the purpose and procedure for

conducting business between Merrill Lynch and Michelson and the First National Bank. This court must review and reverse since standing alone the document is conclusive to the issues.

The hedging agreement(x-5) details the purpose of the dealing. i.e. to "finance commodity hedging transactions in metal contract." Hedging agreements were found at both brokers at the time, EF Hutton, and Merrill Lynch, and testimony at trial supports that there was a trade account opened later at Dean Witter. Existence of those agreements excludes the possibility that the account was an investor or speculator. Merrill Lynch cannot be said to now come and say through Armstrong that it was speculative, because in 1978, through their manager signing this document, they concurred that the purpose to be hedging.

This was considered by the the US District Court and was important to his finding "that Michelson was a dealer in precious metal."

This testimony of Armstrong is the only pretext of evidence she has which underlies the idea of speculative. It is improperly weighted under the parol evidence rule. The document should govern Merrill Lynch's testimony, not the words of an account executive after they were ensnarled in litigation.

Since the lower court in briefing was presented the issue of ruling on this, she was required to rule and this court required to review the ruling or lack of it, and apply parol rule itself.

After finding that the account was apparently opened as a trade or hedging account, rather than as a speculative account. (pg 4) she switches around to

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find in a footnote on page 6 that she "finds that in 1979 and 1980 petitioner had a speculative account or at least was using his account to speculate." This was determined in 1986 by asking the people petitioner was litigating against. She ignores his account at EF Hutton which was a hedge or trade account in which over half the business was conducted, and which the expert said he relied on also. She ignored the testimony of the EFHutton account executive that it was hedging in a trade account- that metal was delivered. And she ignores the most reliable evidence which is the contract and it contained the totality of the understanding of the the relationship. The existence of the hedging agreement undermines the judgment in such a manner that it must be reversed.

-Point 20-

Judge Parker was blinded to the commercial significance of the corner and its predatory character. Thus she was not listening to what happened to one small dealer in that market who had his business nearly destroyed by it. She wanted to only see the transaction in the context she brought to trial and get this silver tax straddle abuser, if only she can by pass **Miller Gilbert.**

She missed the gestalt of the overall inference--cf Duberstein v Cir 363 US 290 by failing to see the continuum of events as early as 1978 where a small businessman was going about setting up his business. Can all those good people be wrong in their assessment of Michelson as a dealer. The experts, the banker and the brokers, the accountants, and the other business people. The documents in the normal

course of business. Can the government be doing such a bad job in all the other departments that there records are to be disbelieved. The District Court, The Department of Labor, the Commodity Futures Trading Commission, The State and local governments ? Yet her reply is that "they are not determinative for this court for tax purposes." At some point she should have taken to the Judges job of harmonizing the tax laws. And we believe it was her duty to have done that in subordinating the issue to the findings of the District Court, and allowed Judicial Notice so summary judgment could have been moved. Surely after **Miller, Gilbert** it was clear that for 1979 Michelson is presumed to be a dealer and to have sustained those losses in the year of disposition.